No. 88-155-CSY
Status: GRANTED

Title: Texas, Petitioner
v.
Gregory Lee Johnson

Docketed:
July 27, 1988

Court: Court of Criminal Appeals of Texas

Counsel for petitioner: Drew,Kathi Alyce

Counsel for respondent: Weinberg,Stanley J.,
Kunstler,William M.

Entry	Date	Note	Proceedings and Orders
1	Jul 27 1988	G	Petition for writ of certiorari filed.
3	Aug 24 1988		Order extending time to file response to petition until September 28, 1988.
4	Aug 27 1988	G	Application (A88-170) for a stay pending disposition of a petition for writ of certiorari, submitted to Justice White.
5	Sep 1 1988		Application (A88-170) denied by Justice White.
6	Sep 9 1988	C	Application (A88-170) refiled and submitted to The Chief Justice.
7	Sep 16 1988		Application (A88-170) referred to the Court by the Chief Justice.
8	Sep 28 1988		DISTRIBUTED. October 14, 1988
9	Sep 28 1988		Brief of respondent Gregory Lee Johnson in opposition filed.
10	Oct 11 1988		Application (A88-170) granted by the Court. The application for stay addressed to the Chief Justice and referred to the Court is granted and it is ordered that the mandate of the Court of Criminal Appeals of Texas, case No. 372-86, is recalled and stayed pending this Court's action on the petition for a writ of certiorari. In the event the petition for a writ of certiorari is denied, this order terminates automatically. Should the petition for a writ of certiorari be granted, this order is to remain in effect pending the issuance of the mandate of this Court.
11	Oct 17 1988		Petition GRANTED.
			**********
12	Nov 9 1988		Record filed.
		*	Certified copy of original record, 2 volumes, received. (Box).
15	Nov 30 1988		Joint appendix filed.
16	Nov 30 1988		Brief of petitioner Texas filed.
14	Dec 1 1988		Brief amicus curiae of Legal Affairs Council filed.
19	Dec 1 1988		Brief amici curiae of Washington Legal Foundation, et al. filed.
18	Dec 8 1988		Order extending time to file brief of respondent on the merits until January 25, 1989.
20	Jan 25 1989		Brief amici curiae of Jasper Johns, et al. filed.
21	Jan 25 1989		Brief of respondent Gregory Johnson filed.
22	Jan 25 1989		Brief amici curiae of ACLU, et al. filed.
23	Jan 25 1989		Brief amici curiae of Christic Institute, et al. filed.
24	Jan 25 1989		Lodging received. (9 copies).
25	Feb 3 1989		SET FOR ARGUMENT TUESDAY, MARCH 21, 1989. (4TH CASE)

No. 88-155-CSY

Entry	Date	Note	Proceedings and Orders
26	Feb 8 1989		CIRCULATED.
27	Feb 22 1989	X	Reply brief of petitioner Texas filed.
28	Mar 21 1989		ARGUED.

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NO. 88-155

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF TEXAS,
Petitioner

vs.

GREGORY LEE JOHNSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
TEXAS COURT OF CRIMINAL APPEALS

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QUESTION PRESENTED

1. DOES THE PUBLIC BURNING OF AN AMERICAN FLAG DURING THE COURSE OF A POLITICAL DEMONSTRATION CONSTITUTE FREE SPEECH SUBJECT TO THE PROTECTION OF THE FIRST AMENDMENT?

LIST OF PARTIES

GREGORY LEE JOHNSON,

Appellant below and Respondent herein

THE STATE OF TEXAS,

Appellee below and Petitioner herein

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF TEXAS,
Petitioner

vs.

GREGORY LEE JOHNSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas entered in this proceeding on April 20, 1988, for which the State's motion for rehearing was denied on June 8, 1988. For clarity, reference to petitioner is by "State" or "Texas" and reference to respondent is by "Johnson."

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, not yet reported, appears in the Appendix as Johnson v. State, No. 372-86 (Tex. Crim. App. April 20, 1988). The Appendix includes the majority opinion on Johnson's Petition for Discretionary Review to the Texas Court of Criminal Appeals as well as the dissenting opinion thereto. No opinion was issued on denial of the State's motion for rehearing on June 8, 1988. A copy of that order appears in the Appendix. Of interest is also the opinion of the intermediate court of appeals, upholding the constitutionality of the statute in question, which has been published as Johnson v. State, 706 S.W.2d 120 (Tex. App. -- Dallas 1986).

JURISDICTION

The opinion of the Court of Criminal Appeals was entered on April 20, 1988. On May 3, 1988, the State timely filed a motion for rehearing. That motion was overruled, without further opinion, on June 8, 1988.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. I, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . .

U.S. CONST. amend. XIV, § 1, in relevant part:

> No state shall . . .deprive any person of life, liberty, or property, without due process of law.

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[1]An earlier motion for rehearing was filed on April 29, 1988, by the Texas State Prosecuting Attorney's Office; this motion was also overruled, without further opinion, on June 8, 1988. A copy of that order appears in the Appendix.

TEX. PENAL CODE ANN. § 42.09, in pertinent part:

> Desecration of a Venerated Object
>
> (a) A person commits an offense if he intentionally or knowingly desecrates:
> (3) a state or national flag.
> (b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
> (c) An offense under this section is a Class A misdemeanor.

STATEMENT OF THE CASE

The facts of this case, surrounding an incident which occurred during the 1984 Republican National Convention in Dallas, Texas, are of some importance in resolving the issues presented by this

petition. The record[2] reflects that on August 22, 1984, Dallas Police Officer Terry Stover was assigned to infiltrate a planned demonstration being held in response to the convention. Officer Stover, acting undercover, joined a march called a "War Chest Tour" at Dealy Plaza in downtown Dallas and moved with the protesters as they marched through downtown Dallas. (R.II-58-59,60).

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[2] In accordance with the suggestions advanced in R. STERN, E. GRESSMAN and S. SHAPIRO, Supreme Court Practice, § 630 (6th ed. 1986), the State has not filed the record with this Court at this time. The statements made by the State and the record references advanced are essentially identical as those relied on by the State throughout the course of the appellate process and should come as no surprise to Johnson's attorneys. For convenience, the State has utilized the proper Texas citation form for a record in a criminal case as set forth in TEX. R. APP. P., Appendix for Criminal Cases, 1(a) and (b). The notation "R.I" refers to the transcript or volume containing papers filed with the trial court; "R.II" through "R.VI" refers to the five volumes of the statement of facts or court reporter's transcriptions.

During this march, Officer Stover noticed that Johnson and a woman, Denise Williams, appeared to be the leaders of this group as both encouraged the crowd by use of a megaphone. (R.II-80).

The protesters initially stopped at LTV Tower and traveled to the bottom floor, an area where shops were located. (R.II-71). At this point, the protesters conducted a "die-in," an event in which the protesters would count down from ten and then fall to the floor, moaning and yelling for approximately three to four minutes. (R.II-72). Apparently, this demonstration was designed to represent the force and effect of a nuclear bomb explosion. After conducting this "die-in," the marchers walked through Thanksgiving Square and entered the Republic Bank building. (R.II-73). At the Republic Bank building, the protesters seized and tore up deposit slips, pulled up potted plants and dumped the soil on the ground. (R.II-75).

The march then moved toward the Diamond Shamrock building. The management of this building, evidently knowing in advance of the march, caused the door of this building to be locked. Upon learning this, the protesters beat on the windows and spray-painted the walls and windows of the building. (R.II-76). The group then traveled to the Plaza of the Americas complex. Here, the marchers again overturned potted plants and spray-painted the floor. (R.II-79). The group then went by a skywalk to the Southland Life building. Various protesters spray-painted the floor and walls of the skywalk. (R.II-81). After another "die-in" at the park, the march moved toward the Mercantile National Bank building.

(R.II-82). There were three flag poles in front of this building, and one of them bore the American flag. Protesters bent all three poles; one protester took down the American flag and gave it to Johnson. (R.II-83-84). The protest march next moved to the Dallas Power & Light Company building, where the doors were locked. As they had done before, protesters spray-painted on the windows and beat against them with their fists. (R.II-85). A short time later, the marchers conducted another "die-in" in front of the Southwestern Bell building. During this "die-in," Officer Stover saw Johnson "shooting the finger" with both hands, saying, "Fuck you, America." (R.II-86-87). Indeed, as the march progressed, Officer Stover heard Johnson

shout such slogans as "Fuck you," "Fuck you, America," and "Fuck the Republicans." (RII-78).

After a stop at the Federal Reserve Building, where protesters again spray-painted and beat against the windows, the group ended up in front of Dallas City Hall. (R.II-87-88). There, Officer Stover saw the United States flag being burned while protesters chanted, "America, the red, white and blue, we spit on you." (R.II-91). Officer Stover testified that she was seriously offended by seeing the burning of the flag. (R.II-92). Officer Stover was not able to see who had burned the flag. (R.II-92).

Officer Roland Tucker, an investigator with the Dallas Police Department, was also assigned to infiltrate the march. (R.III-203-205). Officer Tucker actually witnessed the burning of the

flag in front of City Hall. According to Officer Tucker, a group of about 40 to 50 people encircled the flag. (R.III-216-217). Officer Tucker saw Denise Williams and Johnson holding both ends of the flag. Johnson attempted to light the flag with a cigarette lighter but was unable to do so. (R.III-218). Someone in the crowd then handed Johnson a container of lighter fluid. Johnson applied fluid to the flag on his next attempt and was able to set it on fire. (R.II-219). Officer Tucker was seriously offended by Johnson's actions. (R.III-222). Johnson was not immediately arrested at that time; a contingent of uniformed police did not arrive until about 30 to 45 minutes later. (R.II-250).

The charred fragments of the flag were collected by Daniel Walker, an employee of the United States Army Corps

of Engineers. (R.III-268). Members of the press corps, who were covering the protest march, asked Mr. Walker how he felt when he saw the flag being burned. Mr. Walker testified that he told these reporters:

> This was the first time that I ever saw the flag burning and I told them I felt what -- my feelings, as to I felt that it was -- it was an individual and corporate suicide. And they said, "What do you mean by 'corporate?'"
>
> And I said that in every society, those who try to destroy it will usually succeed in destroying themselves . . .

(R.III-273). Mr. Walker buried the remains of the flag in his backyard. (R.III-273-274).

Johnson did not testify in his own behalf in the guilt/innocence stage of the trial. Defense evidence was presented by three witnesses who had been observers of the march for the American

Civil Liberties Union. These witnesses basically testified that Johnson was not the person who burned the flag.

Johnson was convicted of violating TEX. PENAL CODE ANN. § 42.09(a)(3) (Vernon 1974) and was sentenced by a jury to one year's confinement in the Dallas County jail and assessed a fine of $2000. (R.I-2,3,52, 59). He appealed to the Court of Appeals for the Fifth District of Texas at Dallas which, on January 23, 1986, affirmed his conviction in a published opinion. Johnson v. State, 706 S.W.2d 120 (Tex. App. -- Dallas 1986).

Johnson filed a petition for discretionary review to the Texas Court of Criminal Appeals. That court granted review and, in a written opinion, a bare majority reversed the judgment of the intermediate appellate court and remanded the case to the trial court with instruc-

tions that the indictment be dismissed. Johnson v. State, No. 372-86 (Tex. Crim. App. April 20, 1988). In a 5-4 opinion, the court decided that § 42.09(a)(3) was unconstitutional as applied to Johnson.[3] The majority apparently concluded that Johnson could not be prosecuted for flag desecration since that act, when considered in the context in which it arose, constituted "symbolic speech." The court did not find that Johnson's First Amendment rights, if any, outweighed the State's interests -- preventing a breach of the peace and preserving the flag as a symbol of national unity -- in regulating

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[3]In footnote 6, App., p. 7, the Court of Criminal Appeals expressly noted that it was not addressing the constitutionality of the statute, either facially or as applied to Johnson, under Art. I § 8 of the Texas Constitution. Thus, this case is based solely on the First Amendment and federal law. No procedural questions under Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) are apparent.

this type of conduct; rather, the majority questioned the validity of those interests. The court also held that § 42.09 was overbroad. The court did not rule on Johnson's claim that the statute was void for vagueness on its face.

The federal questions presented in this case were initially raised in a pre-trial motion to quash the information. (R.I-15-18).[4] These grounds were

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[4]Johnson alleged that the statute was "too vague and indefinite in violation of the Constitution of the United States of America and of the State of Texas," "overbroad, punishing actions protected under the First Amendment . . .and the Constitution and laws . . .of Texas," and that the statute was unconstitutional as applied to him, "a protester," since the flagburning occurred "at a demonstration to protest the policies of the United States and the national administration, during the period of the national convention of the Republican Party in Dallas to nominate candidates for the Office of President and Vice-President of the United States, was a type of symbolic speech within the ambit of the free speech clause of the First Amendment to the Constitution of the United States." (R.I-16-17).

reiterated at the close of the State's case-in-chief and again at the close of all the evidence in a motion for an instructed verdict. (R.III-285-289; R.V-623-625). These grounds were reurged in Johnson's motion for new trial, amended motion for new trial, his original appeal to the court of appeals and in his petition for discretionary review to the Court of Criminal Appeals. Following the rendition of the opinion of the Court of Criminal Appeals, the State filed a motion for rehearing urging error in the court's treatment of these issues.

REASON FOR GRANTING THE WRIT

I.

THE TEXAS COURT OF CRIMINAL APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LAW UNDER THE FIRST AMENDMENT

WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, RESOLVED BY THIS COURT; SPECIFICALLY, WHETHER AN ACT OF FLAGBURNING, WHICH OCCURRED AT THE CLIMAX OF A TURBULENT, DESTRUCTIVE AND POTENTIALLY VIOLENT DEMONSTRATION DURING THE 1984 REPUBLICAN CONVENTION CONSTITUTES "SPEECH" ENTITLED TO FIRST AMENDMENT PROTECTION.

This case presents an issue specifically reserved by this Court in Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) and in Street v. New York, 394 U.S. 576,581, 489 S.Ct. 1354,1360,1361, 22 L.Ed.2d 572 (1969), i.e., whether flagburning constitutes "speech" entitled to First Amendment protection. As noted by the

Eleventh Circuit in the case of Monroe v. State Court of Fulton County, 739 F.2d 568,572 (11th Cir. 1984), this Court "has not ruled on the constitutionality of convictions for politically inspired destruction of the American Flag." The State would agree that this Court has never considered the constitutional viability of a statute proscribing flag burning. It is the State's position that the act of flagburning does not rise to the level of speech, or, in the alternative, if the act can be considered speech, Texas is vested with sufficient compelling state interests to justify minimal infringement of a flagburner's First Amendment rights.

First Amendment Considerations

The State recognizes that, at the heart of the First Amendment, is the "recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." Hustler Magazine v. Falwell, 485 U.S. ___, 108 S.Ct. ___, 99 L.Ed.2d 41,49 (1988). This does not mean, however, that no restrictions are recognized. Indeed, this Court has held that a governmental entity, when acting to further legitimate ends of the community, may impose incidental burdens on free speech. Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 925,928-929, 89 L.Ed.2d 29 (1986). A regulation that restrains speech on the basis of content will presumptively violate the First Amendment; "content neutral" time, place, and manner regulations, however, are acceptable so long as these regulations are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. Id., 106 S.Ct. at 928. A regulation is "content neutral" if it is "justified without reference to the content of the regulated speech." Id., 106 S.Ct. at 929 (quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748,771, 96 S.Ct. 1817,1830, 48 L.Ed.2d 346 (1976)).

United States v. Crosson, 462 F.2d 96 (9th Cir. 1972) is illuminating. That case, which analyzed an act of flag desecration prosecuted under 18 U.S.C. § 700, said as follows:

> Clearly, the restriction on Appellant's First Amendment freedoms is no greater than is essential to the furtherance of the national interest. She has not been deprived of a forum for expressing

her dissent, but rather denied the use of the flag for contemptuous physical destruction.

462 F.2d at 102.

O'Brien and Spence

The standards for flagburning cases were originally were set forth in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1965). O'Brien was convicted of violating a federal statute proscribing destruction or mutilation of a selective service registration certificate, commonly known as a draft card, during an anti-war demonstration. Defendant argued that his act of burning his draft card was symbolic speech within the scope of the First Amendment as the burning occurred within the larger context of a demonstration against the

Vietnam war and the draft.[5] This Court, in rejecting defendant's argument, stated as follows:

> We cannot accept the view that apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is a constitutionally protected activity. This Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitation on First Amendment freedoms.

88 S.Ct. at 1678-1679 (emphasis added).

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[5] It is interesting to note that O'Brien admitted to agents of the Federal Bureau of Investigation that he had burned his draft card "because of his beliefs, knowing that he was violating federal law." 88 S.Ct. at 1675.

This Court then stated that a governmental regulation would be sufficiently justified if 1) it is within the constitutional power of the government; 2) it furthers an important or substantial governmental interest; 3) if the governmental interest is unrelated to the suppression of free expression; and 4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 88 S.Ct. at 1679. This Court found that the statute prohibiting the destruction of a draft card met all those requirements. This Court also held that O'Brien's conviction was for the non-communicative aspect of his conduct and nothing more. 88 S.Ct. at 1682.

The O'Brien test was refined in Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Spence was convicted under a Washington statute prohibiting improper use of the United States flag.[6] Spence displayed the flag from his window; superimposed on the flag in removable tape was a peace symbol. Spence testified that he displayed his privately owned flag in order to protest certain historical events of significance at the time, specifically, the United States invasion of Cambodia and the killing of students at Kent State University. Although Spence apparently intended to place the flag on public view, this Court noted that the record contained no evidence that anyone other than the arresting officers had observed

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[6]Spence was not charged under Washington's flag desecration statute. 94 S.Ct. at 2728.

the flag. 94 S.Ct. at 2729. This Court recognized the O'Brien test that not all varieties of activity can be labeled as speech simply because the actor intends to convey an idea. 94 S.Ct. at 2730. This Court held, however, that defendant's activity constituted a form of symbolic expression. 94 S.Ct. at 2730.

Spence rejected the asserted state interest in preventing a breach of the peace, because this Court perceived no evidence in the record of a breach of the peace. 94 S.Ct. at 2731. Apparently, defendant was able only to display the flag briefly before police officers discovered the act. Next, this Court rejected a claimed state interest in protecting the sensibilities of passers-by. 94 S.Ct. at 2731. Lastly, this Court considered Washington's interest in

protecting the United States flag as a symbol of national unity; this Court assumed, without deciding, the validity of this interest. 94 S.Ct. at 2731.

Spence established a two-part analysis for flag desecration cases. The appellate court must determine 1) whether the conduct is protected under the First Amendment and 2) whether, upon the record of the given case, the interests advanced by the State are so substantial as to justify infringement of a defendant's constitutional rights. Both the court of appeals and the Texas Court of Criminal Appeals applied Spence in deciding this case.

Flagburning Is Conduct

In the original appeal, the intermediate court of appeals found that Johnson's act of flagburning constituted

"symbolic speech" in that it was "intended to convey a particularized message . . .and that this message was very likely to be understand by those who viewed it."[7] Johnson v. State, 706 S.W.2d 120,123 (Tex. App. -- Dallas 1986); App., p. 8. The Court of Criminal Appeals, in its opinion, adopted this holding. App., pp. 9-10. For First Amendment purposes, the State questions this interpretation.

Johnson's actions in publicly burning a United States flag clearly constitute conduct which Texas may proscribe. The Texas legislature may prohibit overt physical acts that it deems offensive

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[7]In its brief to the court of appeals, the State challenged this view. After the issuance of the opinion, however, the State did not seek a rehearing on this finding. The question of whether or not Johnson's act constituted "symbolic speech" was not directly put in issue to the Court of Criminal Appeals. Rather, all parties assumed this standard.

and/or harmful to society; this is true even if some speech aspects are involved. Indeed, § 42.09 does not prohibit speech at all; rather, the prohibitions are directed solely to overt physical acts and are designed to prohibit only those acts involving physical mistreatment of flags and other specifically designated venerated objects.

This is particularly true in view of the fact that § 42.09 is "content neutral."[8] The act of flagburning is prohibited, regardless of the message that the actor seeks to convey. This premise was recognized in Joyce v. United State, 454 F.2d 971,989 (D.C. Cir. 1971), cert. denied, 405 U.S. 969, 92 S.Ct. 1188, 31 L.Ed.2d 242 (1972) wherein a

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[8]The fact that the statute is "content neutral" should further distinguish this case from Boos v. Barry, 485 U.S. ___, 108 S.Ct. ___, 99 L.Ed.2d 333 (1988); see discussion pp. 56-58.

federal circuit court, considering the constitutionality of the federal flag desecration statute,[9] 18 U.S.C. § 700, said: "The statute proscribes certain distinctive acts whether they are associated with any particular expression of views which may be popular or unpopular with any group or individual." Thus, whether the flag is burned out of an act of treason or patriotism, love or hate, satisfaction or dissatisfaction with any particular governmental personnel or policy, the physical act of burning the flag remains prohibited. This statute does not prohibit the "casting of contempt on the flag" nor does it prohibit "fighting words where the flag is concerned"; one can heap abuse on the flag

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[9]The constitutionality of this statute has never been addressed by this Court.

either verbally or in writing. It is only physical acts of mistreatment which § 42.09 proscribes.

Section 42.09 has as its goal the prevention of specific, non-verbal conduct. Burning a United States flag, while it may involve communicative aspects, may properly be prohibited. Texas has a right to regulate the non-speech aspects involved in burning a United States flag. Indeed, the public destruction by fire of a United States flag is exactly the type of conduct which is clearly prohibited under any construction which could be given § 42.09. This conclusion was apparently accepted by the Court of Criminal Appeals which did not expressly find the statute unconstitutionally vague on its face.

Flagburning As "Symbolic Speech"

The State recognizes that flag misuse was recognized as a form of expression in both the majority and dissenting opinions in Spence. Indeed, as previously noted, both the intermediate court of appeals, which affirmed Johnson's conviction, and the Court of Criminal Appeals, which reversed Johnson's conviction and ordered the indictment dismissed, agreed that Johnson's action in burning the flag was not one of "mindless nihilism" but rather constituted "symbolic speech."[10] As the court of appeals properly noted, however, this recognition does not ban all governmental regulation. Indeed, as Chief Justice Rehnquist wrote in his dissenting opinion to Spence v. Washington:

> This Court has long recognized . . .that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language. The Court has further recognized that even protected speech may be subject to reasonable limitation when important countervailing interests are involved. Citizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare. The right of free speech, though precious, remains subject to reasonable accommodation to other valued interests.
>
> Since a State concededly may impose some limitations on speech directly, it would seem to follow a fortiori that a State may legislate to protect important state interests even though an incidental limitation on free speech results. Virtually any law enacted by a State, when viewed with sufficient ingenuity, could be thought to interfere with some citizens preferred means of expression. But no one would argue, I presume, that a State could not prevent the painting of public buildings simply because a particular class of protesters believed

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[10]As previously noted, the Court of Criminal Appeals did not make an independent analysis on this point, but adopted the finding of the Court of Appeals.

> their message would best be conveyed through that medium. Had appellant here chosen to tape his peace symbol to a federal courthouse, I have little doubt that he could be prosecuted under a statute properly drawn to protect public property.

94 S.Ct. at 2733-2734 (emphasis original; citation omitted). The interests asserted by Texas in this case to justify infringement of Johnson's First Amendment rights, if any, are 1) that Texas has a compelling interest in preventing a breach of the peace and 2) that Texas has a valid state interest in protecting the United States flag as a symbol of national unity.

Prevention of a Breach of the Peace

In discussing the State's interest in preventing a breach of the peace, the majority of the Texas Court of Criminal Appeals found that the protest, during which the flag was burned, did not lead

to actual violence, thus obviating the State's legitimate interest in preventing a breach of the peace.[11] The court created a standard not previously recognized by any court of which the State is aware: that actual violence must accompany an act of flagburning before that act may be proscribed. Clearly, this is not the law.

The State's interest in regulating an act of flagburning is not punishment of a breach of the peace but rather prevention of a breach of the peace. This interest has been recognized. Street v. New York, 394 U.S. 576,590-593, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); Jones v. Wade, 479 F.2d 1176,1179 (5th Cir. 1973); Sutherland v. DeWulf, 323 F.Supp. 740,744

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[11]The court did recognize that a state may prevent breaches of the peace by limiting speech, but seemed to dismiss this as a legitimate state interest in the context of flag desecration. App., p. 11.

(S. D. Ill. 1971). See also Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Some cases which have discussed this interest have held that burning a flag, by itself, is so inherently inflammatory that the state may act to prevent breaches of the peace. Johnson, 706 S.W.2d at 123; Deeds v. State, 474 S.W.2d 718,721 (Tex. Crim. App. 1971);[12] See State v. Royal, 113 N.H. 224,305 A.2d 676,680 (1973); State v. Mitchell, 32 Ohio App. 2d 16, 288 N.E.2d 216,226 (1972); State v. Waterman, 190 N.W.2d 809,811-812 (Iowa 1971). Others

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[12]The State recognizes that the court, in its opinion, overrules Deeds. It should be noted that the court of appeals chose to follow the lines of cases exemplified by Deeds. That court was free to choose and, in fact, acted with propriety since Deeds was decided by a Texas court of last resort. The State asserts that this is the appropriate test. Even if analyzed under Monroe, however, there is adequate evidence to demonstrate imminent public unrest and justify Texas' interest in preventing a breach of the peace.

have found that evidence of imminent public unrest must be shown. Monroe v. State Court of Fulton County, 739 F.2d 568,575 (11th Cir. 1984);[13] United State ex rel. Radisch v. Criminal Court, 385 F.Supp. 165,180-182 (S.D. N. Y. 1974); Klein v. Rockingham County Superior Court, 367 F.Supp. 1146,1151-1153 (D. N.H. 1973), aff'd, 502 F.Supp. 789 (1st Cir. 1974); Crosson v. Silver, 319 F.Supp. 1084,1088 (D. Ariz. 1970); Hodsdon v. Buckson, 310 F.Supp. 528,535 (D. Del. 1970), rev'd on other grounds, 444 F.2d 533 (3rd Cir. 1971); People v. Vaughan, 183 Colo. 40, 514 P.2d 1318,1323 (1973); State v. Kool, 212 N.W.2d 518,521 (Iowa 1973); People v. Von Rosen, 13 Ill.2d 68, 147 N.E.2d 327,329 (1958). No

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[13]Even Monroe recognized that the State clearly has a valid interest in preventing a breach of the peace that might arise from certain acts of flag desecration. 739 F.2d at 575.

case which the State has found, however, mandates an actual breach of the peace. The most that is required is for the prosecuting authority to introduce sufficient evidence that demonstrates either the imminence of public unrest or a clear and present danger of a breach of the peace.

Ignored by the court in its opinion is evidence introduced at trial which clearly demonstrates a potential for a breach of the peace. The flagburning occurred during the 1984 Republican National Convention, a time of heightened public presence and media attention in downtown Dallas. Johnson, who was one of the leaders of the gang of protesters, attracted attention with an inflammatory march through the downtown Dallas area. During the course of this march, the protesters invaded several businesses,

damaged and destroyed chattels real and personal,[14] and chanted inflammatory slogans such as "Fuck you, America." The protest, which by this time had attracted a sizeable crowd, ended in front of Dallas City Hall. Several people in the immediate group surrounding the flag came up to spit on it. While the flag burned, some protesters chanted, "America, the

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[14]The record reflects that bank deposit slips were torn up, potted plants were uprooted, and the walls and windows of public buildings were spray-painted. (R.II-73-89). Indeed, the record shows that the flag burned was perhaps a flag stolen from a flag pole in front of the Mercantile National Bank building. (R.II-83-89).

red, white and blue, we spit on you." Moreover, the flagburning occurred on public property.[15]

This is a far cry from the admitted minimum risk of a breach of the peace in Spence, where the defendant briefly displayed an altered flag from his window. Indeed, it is precisely the sort of situation that Texas must be permitted to regulate. The situation was potentially explosive and inherently inflammatory.

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[15]The act of burning the flag took place in front of Dallas City Hall, undoubtedly a public place in an area "over which the State by necessity must have certain supervisory powers unrelated to expression." Spence v. Washington, 94 S.Ct. at 2730. The State's interest in preventing a breach of the peace for an action occurring on public property is clearly different from the State interest in Spence since Spence considered misuse of a flag which was displayed on private property.

Johnson's actions could well have been rewarded by immediate physical reaction from people opposed to his act or from people seriously offended by his act. It is merely fortuitous that no undue public disorder actually occurred since the evidence adduced at trial clearly demonstrated a potential for a breach of the peace.[16] By mandating actual violence, the Texas Court of Criminal Appeals has adopted a standard stricter than is warranted by First Amendment considerations.

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[16]The court itself, in footnote three in its opinion, App., p. 4, notes that a number of other demonstrators also burned a national flag of a foreign country that same day and this action led to a "physical brawl." This, in and of itself, should be sufficient to support the State's claim that it is a valid State interest to prohibit the burning of a national flag since that action may lead to a breach of the peace.

As a practical matter, the rule formulated by the Texas Court of Criminal Appeals by requiring actual, as opposed to potential, violence before the law enforcement apparatus can intervene to terminate the desecration of the American flag actually encourages breaches of the peace by those witnesses to the desecration who wish to see the desecrators punished. Thus, the Court of Criminal Appeals ruling is the spark which can ignite the tinder-box of human emotions created by such demonstrations.

The Flag As a Symbol of National Unity

In addressing the issue of national unity, the Texas Court of Criminal Appeals did not hold that Johnson's First Amendment rights, if any, outweighed Texas' interest in protecting the flag as a symbol of national unity. Rather, the

court questioned the validity of that interest. App., p. 16,20. The court also noted, correctly, that this Court has not specifically addressed this issue in the context of flag desecration. App., p. 17.

As previously noted, in Spence v. Washington, this Court did not specifically recognize the validity of the asserted state interest in protecting the United States flag as a symbol of national unity. Rather, this Court assumed it. Two facts unique to Spence, however, distinguish that case from Johnson's prosecution.

Initially, Washington did not assert an interest in protecting the flag as a symbol of national unity in lower courts, nor did Washington pursue the matter in arguments before this Court. 94 S.Ct. at 2731. Texas, in this case, has always

asserted that protection of the flag as a symbol of national unity is a legitimate state interest justifying infringement of Johnson's First Amendment rights, if any.

Secondly, defendant Spence was not charged under Washington's flag desecration statute, a distinction repeatedly noted by this Court; rather, defendant Spence was charged under Washington's misuse statute. 94 S.Ct. at 2728,2732. The underlying interests between flag desecration and misuse of a flag are different. The interest in protecting the flag as a symbol of our country was, in Spence, concerned mainly with prohibiting use of the flag in a commercial or political context in such a way that it would appear that the United States Government in some way endorsed the message conveyed by the actor. A different interest underlies flag desecration

statutes. In these statutes, a state seeks to prevent dilution of the flag as a symbol of national unity by its wanton destruction in a public context. This interest was noted in Spence as an interest in preventing the flag from losing its symbolic capability of mirroring the sentiments of all who view it. 94 S.Ct. 2732. In Spence, however, this Court stopped short of endorsing the right of a state to protect the flag as a symbol of national unity. This issue should now be squarely addressed.

The notion that a state has a valid and substantial interest in protecting the flag as a symbol of national unity is one which has found favor with a variety of jurists. See Spence v. Washington, 418 U.S. at 421, 94 S.Ct. at 2735 (Rehnquist, J., dissenting); Smith v. Goguen, 415 U.S. 566,587, 94 S.Ct.

1242,1254, 39 L.Ed.2d 605 (1974) (White, J., concurring); Street v. New York, 394 U.S. at 605, 89 S.Ct. at 1372 (Warren, C.J., dissenting), id., 394 U.S. at 615-617, 89 S.Ct. at 1377-78 (Fortas, J., dissenting); United States v. Crosson, 462 F.2d 96,101 (9th Cir. 1972); Bowles v. Jones, 758 F.2d 1479,1482 (11th Cir. 1985) (Kravitch, J., concurring); Monroe v. State Court of Fulton County, 517 F.Supp. 1023,1026 (N.D. Ga. 1983), rev'd, 739 F.2d 568 (11th Cir. 1984); Sutherland v. DeWulf, 323 F.Supp. 740,745 (S.D. Ill. 1971); Monroe v. State, 295 S.E.2d 512,514 (Ga. 1982); Deeds v. State, 474 S.W.2d at 720-721. See also, Halter v. Nebraska, 205 U.S. 34,43, 27 S.Ct. 419 (1907). As Justice White said in Smith v. Goguen, a prosecution for improper use of a flag:

> It is also a historical fact that flags, including our own, have played an important and useful role

> in human affairs. One need not explain fully a phenomenon to recognize its existence and on this case to concede that the flag is an important symbol of nationhood and unity, created by the nation and endowed with certain attributes . . .
>
> I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct might provoke violence . . .there would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. The flag is itself a monument, subject to similar protection.

94 S.Ct. at 1254 (emphasis added). Additionally, the State finds the language contained in the Georgia Supreme Court's opinion in Monroe v. State particularly compelling:

> For over 200 years, the United States flag has played a significant role in the human affairs of the country. It is symbolic of the ideology of our nation. The flag is our representative symbol of the union of our states and the independence of our country. It is clear that the people of this state and of the other states of the Union have a

unique and compelling interest in protecting the flag as a symbol of our nation. What may not be as readily apparent is that the public interest lies in having a symbol to represent the nation. This symbol belongs collectively to the people of the various states. While it is true that a physical reproduction of this symbol in the form of red, white and blue cloth may be privately purchased and donned, that which the flag represents is not subject to private ownership. We recognize that the people of this state have a substantial interest in protecting the symbol; this interest extends to regulating conduct which seeks to destroy the symbol . . .

295 S.W.2d at 514 (emphasis added).

Additionally, the Court of Criminal Appeals had applied an inappropriate test with respect to the governmental interests in protecting the flag as a symbol of national unity. Citing to West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed.2d 1628 (1943), the court found that, in order for a state interest in promoting national unity to outweigh

Johnson's First Amendment rights, "it must be necessary to prevent 'grave and immediate danger' to that interest." App., p. 18.[17] The court reasoned that "government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol." App., p. 20. The court then said as follows:

> If the state has a legitimate interest in promoting a state-approved symbol of unity, that interest is not so compelling, as to essentially license the flags use for only the promotion of governmental status quo. In its brief, the State does not aver why the American flag is in such "grave and immediate danger" of losing the ability to arouse feelings of unity or patriotism such that Sec. 42.09(a)(3) is "essential" to prevent its devaluation into a meaning-

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[17]The court recognized that the interest asserted in Barnette -- a forced pledge of allegiance -- and the interest of Texas asserted herein are distinguishable. The court found, nevertheless, that the two goals were "sufficiently similar" so as to warrant application of the same test. App., p. 18.

> less piece of cloth. We do not believe that such a danger is present.

App., p. 20.

The Court of Criminal Appeals' reliance on the "clear and present danger test" is misplaced. No court has ever required such a test where the act involved is the total and wanton destruction of a United States flag by burning that flag. The rationale behind Barnette was that a state could not compel respect for the flag; while Texas may not have a legitimate interest in compelling respect for the United States flag, Texas does have a legitimate and substantial interest in protecting and preserving the United States flag as a symbol of national unity.

Texas contends that its interest in protecting the flag as a symbol of national unity is both substantial and

compelling. Texas is not attempting to limit Johnson's right to publicly express his dissent against the United States Government as part of any legitimate protest activities. Texas does seek to punish Johnson for trying to destroy the effectiveness of the flag as a symbol revered by the vast majority of Americans. Johnson has not been been denied a forum for expressing his dissent by virtue of the Texas statute; rather, he merely has been denied the use of the flag for physical destruction. The Texas legislature has deemed that the United States flag is a venerated object per se; nothing need be done to prove that the flag is a venerated object or that it is entitled to additional protection. The physical act of desecration itself should show sufficient "danger" to warrant governmental protection.

The Overbreadth Doctrine

The Court of Criminal Appeals, in overturning Johnson's conviction for flagburning, also misapplied the overbreadth analysis under the First Amendment. The overbreadth doctrine is a legal concept formulated by this Court which allows a defendant to challenge a criminal statute on its face as unconstitutionally overbroad if the statute "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities" which are protected by the constitution. Thornhill v. Alabama, 310 U.S. 88,97, 60 S.Ct. 736,742, 84 L.Ed.2d 1093 (1940). In determining an overbreadth attack, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. Houston v.

Hill, ___ U.S. ___, 107 S.Ct. 2502, ___ L.Ed.2d ___ (1987) citing to Hoffman Estates v. The Flip Side, Hoffman Estates, Inc., 455 U.S. 489,494, 102 S.Ct. 1186,1191, 71 L.Ed.2d 362 (1982). The Court of Criminal Appeals never indulged in this analysis. If the court had attempted to answer this threshold question, it would have produced a different result.

Section 42.09 does not inhibit the exposition of ideas; rather, it bans conduct which is not protected by the First Amendment. There is no question under the facts of this case that Johnson's actions came within the prohibitions of § 42.09; the Texas rule has long been that the overbreadth doctrine does not apply where a defendant's acts are within the prohibited zone of a criminal statute. Smith v. State, 478 S.W.2d 518,520 (Tex.

Crim. App. 1972); Deeds v. State, 474 S.W.2d 718,722 (Tex. Crim. App. 1971).[18] The question of constitutional overbreadth should never have been reached.[19] See Judge Miller's dissent, App., p. 26.

Also in addressing the overbreadth challenge, the Court of Criminal Appeals questioned the language of the statute

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[18] In Deeds, the Court of Criminal Appeals, in addressing an overbreadth challenge to the predecessor statute of §42.09, held that the act of burning the flag in a public place "constitutes the type of hard-core conduct which would be prohibited under any construction we might give the statute." 474 S.W.2d at 722.

[19] This Court indicated in Broderick v. Oklahoma, 413 U.S. 601,613, 93 S.Ct. 2908,2916, 37 L.Ed.2d 830 (1973), that the overbreadth analysis should be used only as a "last resort." This the Court of Criminal Appeals clearly failed to do. Indeed, the court reached this result without discussing Johnson's attack on the statute as being facially vague. Moreover, the court reached this issue before reaching the jury argument ground for review. App., p. 22 n. 10.

mandating that "serious offense"[20] be given. The Court noted that limiting the crime to acts of flagburning likely to cause "serious offense" was a proper step toward narrowly tailoring the statute to Texas' interest. App., p. 12. The court found, however, that § 42.09(a)(3) was "so broad" that it might be used to "punish protected conduct which has no propensity to result in breaches of the peace" since "serious offense" will "not always result in a breach of the peace." App., p. 13.

The Court of Criminal Appeals' holding is inconsistent and, as previously discussed, establishes a standard not

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[20] It is also clear, from the evidence adduced at trial, that specific evidence was presented to show that others were "seriously offended" by Johnson's conduct in burning the American flag.

previously recognized by this Court, i.e., that an actual breach of the peace must ensue before the State may proscribe an act of flagburning. This is clearly well beyond the compelling state interest to prevent a breach of the peace recognized in Spence v. Washington. This Court has never held that an actual breach of the peace is necessary in order for the state's interest in this regard to arise.

An additional reason advanced for holding the statute overbroad by the Court of Criminal Appeals is that "[w]hen a statute which restricts speech is under attack for overbreadth, the existence of another legislative alternative which would further the goal of the challenged statute may be used to prove that the challenged statute is overbroad." App., p. 14. This " standard" is set forth without citation to any authority though

the court claims to be guided by Boos v. Barry, 485 U.S. ___, 108 S.Ct. ___, 99 L.Ed.2d 333 (1988). The court finds the statute overbroad because it relates to "breaches of the peace" which are generally prohibited by TEX. PENAL CODE ANN. § 42.01 (Vernon-1974), App., p. 30, the statute which proscribes disorderly conduct and essentially covers the "fighting words" exception to the First Amendment as set forth in Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.2d 1031 (1942). See "Practice Commentary" to § 42.01; see also, Houston v. Hill, 107 S.Ct. at 2510 n. 10.

These sections are not in pari materia.[21] Section 42.01 does not proscribe the destruction of specific property designated by the legislature as a venerated object; § 42.09 does not proscribe "fighting words" or any other form of actual speech. Indeed, had Johnson been arrested for disorderly conducted under § 42.01, he would have had a legitimate argument that he should have been prosecuted under § 42.09 as

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[21] Quite recently, the Court of Criminal Appeals set forth a lengthy and scholarly discussion of Texas law relating to the doctrine of in pari materia in Cheney v. State, No. 1065-84 (Tex. Crim. App. June 29, 1988) (not yet published). Basically, if two statutes do not deal with the same subject matter, persons or purpose, they are not in pari materia and should each be construed separately in accordance with the plain wording of each statute.

that offense covers his conduct more specifically. TEX. GOV'T CODE ANN. § 311.026 (Vernon Pamp. 1988).

Additionally, the court's reliance on Boos v. Barry for the proposition that the existence of a "less restrictive alternative" can lead to constitutional overbreadth is inappropriate. Boos involved a prosecution under a District of Columbia municipal ordinance prohibiting, in part, the display of any sign that tended to bring a foreign government into "public odium" or "public disrepute" within 500 feet of a foreign embassy located within the District. This ordinance was compared with an analogous statute adopted by Congress -- 18 U.S.C. § 112(b)(2) -- which applies to diplomatic personnel outside of the District of Columbia. This Court noted that § 112 originally contained anti-picketing pro-

visions which were deleted in 1976, leaving only a prohibition against intimidating, coercing, threatening or harrassing a foreign official. This Court noted not only these discrepancies but also the fact that "the District of Columbia government has responded to the congressional request . . .by repealing" the municipal ordinance contingent on congressional action to extend 18 U.S.C. § 112(b)(2) to the District of Columbia. This Court then, "relying on congressional judgment in this delicate area," concluded that the availability of alternatives such as § 112 demonstrated that the display clause was not crafted with sufficient precision to withstand First Amendment scrutiny. In the State's opinion, the municipal ordinance was held to be not narrowly tailored not only since a less restrictive alternative was

readily available but also since that alternative was in the process of adoption.

This is not the situation with respect to the Texas statutes at issue. Section 42.01 covers a broad range of disorderly conduct, including fighting words, which tend to incite a breach of the peace. Section 42.09, on the other hand, deals with overt physical acts of desecration of certain venerated objects, specifically, for purposes of this prosecution, a flag of the United States. Desecration is specifically defined and limited under § 42.09 to certain enumerated actions. Thus, § 42.09 is narrowly tailored to fit a certain specified need; in this case, the prevention of flag desecration by publicly burning the flag in a way which is likely to seriously offend others. Section 42.01

does not address the same basic interest as § 42.09 and cannot be considered a "less restrictive alternative."

Summation

The fact that Johnson was a political protester does not cloak him with immunity from prosecution under § 42.09. Johnson's act of publicly burning a United States flag clearly constitutes conduct which is not entitled to First Amendment protection. Even assuming that Johnson's action may be considered "symbolic speech," Texas may properly proscribe these actions in order to prevent a breach of the peace and/or to preserve the flag as a symbol of national unity. These interests outweigh any First Amendment rights Johnson may have in this type of conduct.

CONCLUSION

It is respectfully submitted that, for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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A P P E N D I X

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GREGORY LEE JOHNSON, Appellant
No. 372-86 v.
THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Fifth Supreme Judicial District of Texas [Dallas County]

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Appellant was convicted, after a jury trial, of desecration of a venerated object. V.T.C.A., Penal Code § 42.09(a)(3).[1] Punishment was assessed at

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1 Sec. 42.09 Desecration of Venerated Object.
(a) A person commits an offense if he intentionally or knowingly desecrates:. . .
(3) A state or national flag.
(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offense one or more persons likely to observe or discover his action.

one year's confinement in the Dallas County Jail and a $2,000 fine. The Dallas Court of Appeals affirmed. Johnson v. State, 706 S.W.2d 120 (Tex. App. -- Dallas 1986). We granted the appellant's petition for discretionary review to determine (1) whether V.T.C.A. Penal Code, § 42.09(a)(3) violates Art. I, sec. 8 of the Texas Constitution or the First Amendment to the United States Constitution, and (2) whether the prosecutor's closing argument during the punishment phase of the trial denied appellant a fair trial.[2] We hold that the First Amendment to the U.S. Constitution obviates appellant's conviction under section 42.09(a)(3) and we will remand.

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[2]The reason review was granted is found in Tex. R. App. Pro. 200(c)(2 & 3).

Appellant was arrested during the Republican National Convention in Dallas on August 22, 1984. He was involved with a series of demonstrations against the policies of the Reagan Administration and the Republican Party. These protests culminated with a rally in front of the Dallas City Hall with the burning of an American flag and political chants. The record indicates that these demonstrations were not violent and that police officers and representatives of the news media were present. After the flag had been burned, a spectator gathered the remains for burial in his backyard.

Approximately 30-45 minutes later, more Dallas police arrived to arrest appellant and several other demonstrators.[3]

The Court of Appeals rejected appellant's claim that section 42.09 is impermissibly vague, holding that the statute gives adequate warning as to what conduct is prohibited. That court also found that appellant's conduct amounted to protected speech, within the meaning of the First Amendment, but, relying on Deeds v. State, 474 S.W.2d 718 (Tex.

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[3]On the same day as appellant's arrest, a number of demonstrators burned the national flag of a foreign country. This action lead to a physical brawl; nevertheless, no arrests under section 42.09 were made in connection with the incident.

Crim. App. 1971),[4] found that the State's

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[4]Today, Deeds, supra, is no longer adequate authority. Our holding in Deeds that former Article 152, Vernon's Ann. P.C. was consistent with the test for regulation of symbolic speech enunciated in U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 2727, 41 L.Ed.2d 842 (1974). The Supreme Court reached this result because a State's interest in preserving the flag as a national symbol focuses on the communicative aspect of flag desecration, that of denigrating the nation and, specifically, the flag as its icon. Id. In addition, the Supreme Court's most recent pronouncement on overbreadth analysis in First Amendment contexts suggests that our refusal in Deeds to consider overbreadth is untenable today. See Boos v. Barry, 56 U.S.L.W. 4254, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1988).

This Court's other major discussion of former article 152 occurred in Delorme v. State, 488 S.W.2d 808 (Tex. Crim. App. 1973). Like Deeds, the Delorme decision is of questionable value today. In addition to relying on Deeds, the Delorme opinion followed a number of cases from other jurisdictions. State v. Van Camp, 6 Conn. Cir. 609, 281 A.2d 584 (1971); Commonwealth v. Goguen, 279 N.E.2d 666 (Mass. 1972) (conviction later reversed as violative of the First Amendment sub. nom. Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); State v. Kasnett, 30 Ohio App. 2d 77, 283 N.E.2d 636 (1972), rev'd 34 Ohio St. 2d 193, 297 N.E.2d 537 (1973). Of the cases expressly followed in Delorme, only Van Camp, supra, decided by an intermediate appellate court in Connecticut, has not been overturned by a higher court.

interest in regulating this symbolic speech outweighed appellant's First Amendment rights.[5]

In his petition for discretionary review, appellant reurges his arguments made in the Court of Appeals on the constitutionality of the statute under which

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[5]The Dallas court also rejected points of error concerning the admission of video tape depictions of extraneous misconduct by others, a jury instruction on the law of parties, admission of appellant's prior convictions, and the prosecutor's argument during the punishment phase of the trial. Although we granted review on the question concerning the jury argument, none of these points are relevant to our ultimate disposition of this case.

he was convicted.[6] This argument asserts vagueness and overbreadth as reasons declaring section 42.09 unconstitutional. The State asserts two interests in support of section 42.09(a)(3): (1) to prevent breaches of the peace and (2) to

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[6]In the Court of Appeals, appellant assigned eight separate points of error on the issue of free speech. Of these eight points, half were based exclusively on Texas law. The Court of Appeals grouped these eight points together and purportedly decided them on both state and federal grounds. Their analysis, however, depended completely on cases which applied only the federal constitution. Despite that court's claim to have disposed of the State law issues, those questions are yet to be decided.

When a Court of Appeals is presented with both state and federal bases for a proposition of constitutional law and fails to address the state law aspects of the question, this Court's procedure is to review the correctness of the Court of Appeals's application of federal law and then remand, if necessary, for a determination of the state law issues. McCambridge v. State, 712 S.W.2d 499, 501-02 n.9 (Tex. Crim. App. 1986). We will not, therefore, address article I, sec. 8 of the Texas Constitution in this opinion.

preserve the flag as a symbol of national unity and counters by restating the positions advanced by the Court of Appeals.

In analyzing a symbolic speech question, the proper methodology requires the reviewing court to first determine whether a defendant's acts fall within the First Amendment. See, e.g., Spence v. Washington 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974); Tinker v. Des Moines Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); Monroe v. State Court of Fulton Co., 739 F.2d 568 (11th Cir. 1984); c.f. United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The Dallas court held that, by burning a flag, appellant "intended to convey a particularized message...and that this message was very likely to be understood by those who viewed it." Johnson, supra

at 123. There is no reason for us to reach a different conclusion. The United States Supreme Court has held a number of activities to be protected "speech." Spence, supra (affixing a peace symbol to a flag); Tinker, supra (wearing of black arm bands); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632-34, 63 S.Ct. 1178, 87 L.Ed.2d 1628 (1943) (not saluting the flag being protected by the First Amendment's speech provision); c.f. O'Brien, supra (Court refusing to decide whether draft card burning is speech). Given the context in which appellant burned the flag, "it would have been difficult for the vast majority of citizens to miss the drift of appellant's point at the time that he made it." Spence, supra at 410. Conduct falls within the ambit of the First Amendment when the actor shows "an intent

to convey a particularized message...and in the surrounding circumstances the likelihood was great that the message would be understood by those viewed it." Id. at 410-11. Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly "speech" contemplated by the First Amendment.

Falling within the umbrella of First Amendment protection will not shield speech from all government regulations. E.g., Metromedia, Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298

(1981); Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). Therefore, we must undertake to weigh the interests which the State asserts in support of section 42.09(c)(3).

The first interest averred offered by the State is the prevention of breaches of the peace which would likely be attendant to acts of flag desecration. A State may prevent breaches of the peace by limiting speech. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.2d 1031 (1942); see also Ex parte Meckel, 87 Tex. Cr. R. 120, 220 S.W. 81 (1919). Legitimacy of a State interest, however, is not enough to bring the regulation of protected speech into compliance with First Amendment protection. The Supreme Court has repeatedly held

that restrictions on speech must be very carefully tailored to meet a state's legitimate interests.[7]

Limiting the criminalization of flag desecration to incidents where it is likely to cause "serious offense" is a proper step toward narrowly tailoring the statute to the State's interest. Still,

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[7] O'Brien, supra at 377 (A "government regulation is sufficiently justified . . .if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherence [sic] of that interest.") (all emphasis is the author's unless otherwise noted). Barnette, supra at 639 ("The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."). See also Boos v. Barry, 56 U.S.L.W. 4254, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1988) (discussed infra at page 5).

section 42.09(a)(3) is so broad that it may be used to punish protected conduct which has no propensity to result in breaches of the peace. "Serious offense" does not always result in a breach of the peace. The protest in this case did not lead to violence. As with most other protests of this nature, police were present at the scene. A witness was obviously "seriously offended" by appellant's conduct because he gathered the burned flag and buried it at his home; nevertheless, though "seriously offended", this man was not moved to violence. "Serious offense" occurred, but there was no breach of peace nor does the record reflect that the situation was potentially explosive. One cannot equate "serious offense" with incitement to breach the peace.

When a statute which restricts speech is under attack for overbreadth, the existence of another legislative alternative which would further the goal of the challenged statute may be used to prove that the challenged statute is overbroad. Very recently, the Supreme Court decided a challenge to an ordinance in the District of Columbia. Boos v. Barry, 56 U.S.L.W. 4254, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1988). The ordinance made it unlawful to, within 500 feet of a foreign embassy, display any sign that tends to bring the foreign government into "public odium or public disrepute." Noting that Congress had provided a less restrictive alternative, 18 U.S.C. § 112 (b)(2), which served the same interest as the challenged ordinance, the Court wrote:

> [W]e conclude that the availability of alternatives such as § 112 amply demonstrates that

> the display clause is not crafted with sufficient precision to withstand First Amendment scrutiny. It may serve an interest in protecting the dignity of foreign missions, but it is not narrowly tailored; a less restrictive alternative is readily available. Thus, even assuming for present purposes that the dignity interest is "compelling," we hold that the display clause of §22-1115 is inconsistent with the First Amendment.

Boos, supra 56 U.S.L.W. at 4259.

For example, section 42.01 of the penal code states:

> (a) A person commits an offense if he intentionally or knowingly:
>
> (1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;
>
> (2) makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace. . .

V.T.C.A. Penal Code, § 42.01 (emphasis added). The existence of a statutory scheme other than section 42.09 which addresses the same basic interest in a less restrictive manner indicates that the legislature is aware of and able to implement an alternative to the language of section 42.09. Section 42.01, like section 112 in Boos, proves that the challenged statute, as it relates to breaches of the peace, is too broad for First Amendment purposes.

The second interest asserted by the State is that of preserving the flag as a symbol of unity. In Spence, supra, the Court refused to decide the validity of a state's interest in preserving the flag as a national symbol. Id. at 413-14. Instead, the Court assumed arguendo the

validity of the interest, and held Washington's flag misuse statute to be unconstitutional. Id. at 414-15.[8] The Supreme Court specifically reserved judgment on the question of flag desecration. This indicates that precedent prior to Spence does not necessarily require rejecting the State's interest in preserving the flag as a symbol. There is some precedent, however, which seems to indicate the weight this interest might be given in a balancing process.

In Barnette, supra, the parents of a child complained of a West Virginia law requiring children to salute the flag and

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[8]Spence had been prosecuted for violating Washington's misuse statute. This statute forbade affixing any mark, word, picture, design, etc. to a flag. The State of Washington also criminalized flag desecration. This provision is in a separate section, however, and Spence was not charged with its violation. Id. at 406-07. The Court specifically reserved the question of protecting the flag as a symbol from desecration. Id. at 415.

recite the Pledge of Allegiance. Failure to comply resulted in suspension from school. The goal of the West Virginia statute was to promote national unity. In order for this interest to be sufficient to abridge activity protected by the First Amendment, it must be necessary to prevent "grave and immediate danger" to that interest.[9]

The interest asserted in Barnette is distinguishable from the State's desire to preserve the flag as a symbol of national unity. The two goals, however, are sufficiently similar that the Supreme Court's discussion of promoting national unity is relevant to our decision. Justice Jackson wrote:

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[9]See note 5, supra, for the full text of this standard.

> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of this substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 641-42. Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity

in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to present.

If the State has a legitimate interest in promoting a State approved symbol of unity, that interest is not so compelling as to essentially license the flag's use for only the promotion of governmental status quo. In its brief, the State does not aver why the American flag is in such "grave and immediate danger" of losing the ability to rouse feelings of unity or patriotism such that section 42.09(a)(3) is "essential" to prevent its devaluation into a meaningless piece of cloth. We do not believe such a danger is present. Because

Barnette, O'Brien, and Boos would require such a threat in order to to [sic] uphold violations of federal free speech guarantees, we must hold that the interest of providing a symbol of unity is inadequate to support section 42.09(a)(3).

We hold that section 42.09(a)(3) may not be used to punish acts of flag desecration when such conduct falls within the protections of the First Amendment. We express no view as to whether the State may prosecute acts of flag desecration which do not constitute speech under the First Amendment. Because of this holding, we will not reach the portions of the appellant's argument which challenge the facial validity of the statute on grounds of vagueness. This Court will not pass on the facial constitutionality of a statute unless it is absolutely necessary for the disposition of the

case. See generally Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). Thus, our holding that the statute is unconstitutional as applied to this appellant renders a facial determination unnecessary. In addition, we need not reach appellant's contention concerning the prosecutor's jury argument in the punishment phase of the trial.[10]

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[10]It may appear anomalous that we have decided the constitutionality of the section 42.09(a)(3), as applied, before reaching the jury argument ground for review. It should be noted that this alleged error occurred during the punishment phase of the trial. A reversal on this point would not affect the validity of appellant's conviction. Instead, it would merely result in a remand to the trial court for a new hearing on punishment. Art. 44.29(b) V.A.C.C.P. Thus, a complete disposition of this case requires us to first decide the validity of the conviction and then to proceed, if necessary, to punishment.

The judgments of the Court of Appeals and the trial court are reversed and the cause is remanded to the trial court for dismissal of the information.

CAMPBELL, J.

Delivered April 20, 1988

En Banc

Publish

P.J. Onion and J. Davis dissent for the reason that they believe the Court of Appeals was correct.

J. McCormick dissents.

GREGORY LEE JOHNSON, Appellant
No. 372-86 v.
THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Fifth Supreme Judicial District of Texas [Dallas County]

DISSENTING OPINION

I do not agree with the majority that the State's interest in providing the flag as a symbol of unity is inadequate to support Sec. 42.09(a)3), V.A.P.C. I find the discussion of the symbolism of the flag in this Court's unanimous opinion in Deeds v. State, 474 S.W.2d 718 (Tex. Crim. App. 1972), both viable and highly persuasive, and I would apply the rationale of that case to the present cause.

In Deeds, supra, we held that the State had a right to regulate the non-speech aspect of the burning of the flag of the United States v. O'Brien, 391 U.S.

367 (1968). In considering the Deeds discussion about our national flag and the facts of this flag desecration case, I believe the regulation of appellant's nonverbal conduct, albeit admittedly symbolic speech, under Sec. 42.09(a)(3) is justified. The valid State interest of preserving the flag as a symbol of national unity clearly, in my view, supersedes whatever first amendment rights this appellant sought to assert. See dissenting opinions of chief Justice Warren and Justices Black, Fortas, and White, in Street v. New York, 394 U.S. 604 (1969); Halter v. Nebraska, 205 U.S. 34 (1907). As noted in Deeds, supra:

> "Since the flag symbolizes the entire nation, not just one particular political philosophy, the state may determine that it be kept above the turmoil created by competing ideologies." (emphasis supplied)

Though it may not pass muster in other fact situations or under other statutes, see e.g. Smith v. Goguen, 415 U.S. 556 (1973), Sec. 42.09, supra, passes constitutional muster in its application to destroying a United States flag, even as an exercise of "speech", in a manner "the actor knows will seriously offend" persons observing the action. Section 42.09, supra, is here being narrowly applied to a fact situation involving total destruction of the United States' national symbol. I do not agree that the statute is unconstitutional as applied to appellant or that he has grounds to make such challenge. Cf. Briggs v. State, 740 S.W.2d 803 (Tex. Crim. App. 1987) (defendant must show that statute is unconstitutional as applied to him in his situation).

I dissent.

Miller, Judge

En Banc

Publish

Delivered: 4/20/88

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

June 8, 1988
COA#: 05-85-00318-CR

RE: Case No. 0372-86
STYLE: Johnson, Gregory Lee

On this day the State's Motion for Rehearing was denied.
PRESIDING JUDGE ONION & JUDGES DAVIS, MCCORMICK & MILLER WOULD GRANT

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: John C. Vance
Crim Dist Attorney
County Courthouse
Dallas, TX 75202

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

June 8, 1988
COA#: 05-85-00318-CR

RE: Case No. 0372-86
STYLE: Johnson, Gregory Lee

On this day the State's Motion for Rehearing filed by the State Prosecuting Attorney was denied.
PRESIDING JUDGE ONION & JUDGES DAVIS, MCCORMICK & MILLER WOULD GRANT

Thomas Lowe, Clerk

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P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: John C. Vance
Crim Dist Attorney
County Courthouse
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TEX. PENAL CODE § 42.01 **Disorderly Conduct**

(a) A person commits an offense if he intentionally or knowingly:

(1) uses abusive,indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;

(2) makes an offensiv: gesture or display in a public place,and the gesture or display tends to incite an immediate breach of the peace;

(3) creates, by chemical means, a noxious and unreasonable odor in a public place;

(4) abuses or threatens a person in a public place in an obviously offensive manner;

(5) makes unreasonable noise in a public place or in or near a private residence that he has no right to occupy;

(6) fights with another in a public place;

(7) enters on the property of another and for a lewd or unlawful purpose looks into a dwelling on the property through any window or other opening in the dwelling;

(8) while on the premises of a hotel or comparable establishment, for a lewd or unlawful purpose looks into a guest room not his own through a window or other opening in the room;

(9) discharges a firearm in a public road;

(10) displays a firearm or other deadly weapon in a public place in a manner calculated to alarm;

(11) discharges a firearm on or across a public road; or

(12) exposes his anus or genitals in a public place and is reckless about whether another may be present who will be offended or alarmed by his act.

(b) It is a defense to prosecution under Subsection (a)(4) of this section that the actor had significant provocation for his abusive or threatening conduct.

(c) For purpose of this section, an act is deemed to occur in a public place or near a private residence if it produces its offensive or proscribed consequences in the public place or near a private residence.

(d) An offense under this section is a Class C misdemeanor unless committed under Subsection (a)(9) or (a)(10) of this section, in which event it is a Class B misdemeanor; and further provide that a person who violates Subsection (a)(11) is guilty of a misdemeanor and on a first conviction is punishable by a fine of not less than $25 nor more than $200, on a second conviction is punishable by a fine of not less than $200 nor more than $500, and on a third or subsequent conviction is punishable by a fine of $500.

(2)

Supreme Court, U.S.
FILED
SEP 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF TEXAS, *Petitioner*,

—v.—

GREGORY LEE JOHNSON, *Respondent*.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent submits this brief in opposition to the petition for a writ of certiorari filed by the Dallas County District Attorney,[1] which seeks review of the judgment entered in this action by the Texas Court of Criminal Appeals on April 20, 1988.

STATEMENT OF THE CASE

Respondent peacefully burned an American flag during a political demonstration in front of the Dallas City Hall on August 22, 1984. He was convicted and sentenced to one year in confinement and a

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1/ Neither the Texas Attorney General, nor the State Prosecuting Attorney who represented the state in the Court of Criminal Appeals, chose to file a petition for certiorari in this case. The Dallas County District Attorney, who filed the petition for certiorari, was formerly a judge on the Dallas Court of Appeals. In that capacity, he wrote a decision in this case upholding respondent's conviction that was later reversed by the Texas Court of Criminal Appeals.

$2,000 fine under Texas Penal Code §42.09, which prohibits desecration of a state or national flag by "defac[ing], damag[ing] or otherwise physically mistreat[ing]" it in a manner the actor knows will "seriously offend" one or more observers. His conviction was subsequently vacated by the Texas Court of Criminal Appeals on First Amendment grounds.

Petitioner's Statement of the Case is largely devoted to describing events that are not germane to the legal question presented. On the relevant legal issue, petitioner is unable to point to any evidence in the record indicating that respondent's decision to burn the flag created unrest or the imminent likelihood of unrest. Indeed, petitioner's elaborate recitation of the day's activities cannot obscure the simple fact that the only

charge ever brought against respondent was flag desecration; he was not charged with any act of vandalism or breach of the peace.

The context in which respondent's action took place highlights its political nature. The flag burning occurred during one of many demonstrations held in Dallas during the 1984 Republican National Convention. In addition to respondent's act of political protest, the demonstration included speeches opposing the policies of the Reagan administration, symbolic "die-ins" designed, as petitioner observes, "to represent the force and effect of a nuclear bomb explosion," Pet. at 6, and the peaceful flag burning at City Hall.

Upon reviewing the evidence at respondent's trial, the Texas Court of Criminal Appeals held: "The act for which

[respondent] was convicted was clearly 'speech' contemplated by the First Amendment." Applying well-settled First Amendment principles, the court then concluded that respondent's conviction could not stand:

> Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to present.

App. at 19-20.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CORRECTLY APPLIED THIS COURT'S FIRST AMENDMENT STANDARDS

In reviewing the propriety of respondent's conviction, the Texas Court of Criminal Appeals faithfully applied the decisions of this Court and reached a conclusion that is entirely consistent with the judgment of other courts facing similar issues. See Point II, infra. Petitioner's attempt to create a sense of legal uncertainty is, therefore, without basis.2/

2/ It is worth noting that if this Court were to reverse the decision of the Texas Court of Criminal Appeals, the appropriate course would be to remand the case to the state court to consider whether the Texas Constitution would afford respondent's expression greater constitutional protection than the federal Constitution. As the Texas Court of Criminal Appeals explained, it did not decide whether the Texas Constitution requires a reversal of Johnson's conviction because it is that court's procedure "to review the correctness of the Court of Appeals' application of federal law and then remand, if necessary, for a determination of the state law issues." App. at 7, n.6.

The decision below rests on four legal premises, each of which is disputed by petitioner but each of which is grounded in well-settled constitutional doctrine.

First, petitioner challenges the conclusion below that this case involves symbolic political speech. That conclusion, however, is clearly supported by this Court's decision in Spence v. Washington, 418 U.S. 403 (1974).[3/] Here, as in Spence, "there can be little doubt that [respondent] communicated through the use of symbols." Id. at 410. Here, as in Spence, respondent plainly intended "to convey a particularized message . . . and in the surrounding circumstances the likelihood

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3/ The defendant in Spence was arrested for placing a peace symbol over an American flag, which he then hung from his window. This Court reversed, noting the "communicative connotation of the use of flags." 418 U.S. at 410.

was great that the message would be understood by those who viewed it." Id. at 411. And here, as in Spence, respondent's activity, "combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression." Id. at 410.

Second, petitioner disagrees with the level of scrutiny applied by the Texas Court of Criminal Appeals. Even assuming that respondent's conduct represented symbolic political speech, petitioner argues that only intermediate scrutiny is required by this Court's decision in United States v. O'Brien, 391 U.S. 367 (1968). Once again, that very same argument was made and rejected in Spence. Commenting on the state's asserted interest in preserving a symbol of national unity -- precisely the

argument advanced by petitioner -- this Court observed:

> If this interest is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant. For that reason, and because no other governmental interest unrelated to expression has been advanced or can be supported by this record, the four-step analysis of United States v. O'Brien is inapplicable.

418 U.S. at 414 n.8 (citation omitted).4/

Third, petitioner contends that its interest in preventing a breach of the peace is sufficient to warrant restricting respondent's symbolic expression. However, the Texas court correctly applied the standard of Brandenberg v. Ohio, 395 U.S.

4/ In this case, petitioner has asserted the additional interest in preventing a breach of the peace. That interest is also speech-related, at least as articulated by petitioner, since it was entirely based on anticipated hostility to the political message conveyed by respondent's flag-burning.

444 (1969), when it concluded that "there was no breach of the peace, nor does the record reflect that the situation was potentially explosive." App. at 13. As this Court has repeatedly held, unless an action is both "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action," 395 U.S. at 447, the state's interest in preventing a breach of the peace cannot justify abridging First Amendment rights.

Indeed, this Court has rejected the theory that expression may be suppressed based on unsubstantiated predictions of a breach of the peace. See Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 508 (1969)("in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"). As the Texas court recog-

nized, "[o]ne cannot equate [the statute's reference to] 'serious offense' with incitement to breach the peace." App. at 13. An imminent and likely breach of the peace is what this Court has required before speech may be suppressed in the interests of social tranquility.

Both in this Court and below, petitioner has contended that flag burning is so inherently inflammatory that a breach of the peace may be presumed. Petitioner ignores the fact that no breach of the peace occurred in this case, cf. NAACP v. Claiborne Hardware, 458 U.S. 886, 929 (1982), and that the lower courts have often reviewed acts of flag desecration unaccompanied by even a threat of violence.5/

5/ See, e.g., Spence, 418 U.S. at 409 ("the record is devoid of proof of any risk of breach of the (continued...)

Finally, petitioner argues that the court below was wrong in discounting the state's interest in preserving the flag as a symbol of national unity -- an interest that petitioner apparently believes is sufficient to prohibit any attack on the flag.6/ While it may be true that this Court has never resolved that question in precisely this form, it is equally true that this Court has often indicated in

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5/ (...continued)
peace"); Jones v. Wade, 479 F.2d 1176, 1180 (5th Cir. 1973)("there is no indication that his actions ever provoked violence or public disorder . . . and it is questionable whether mutilation of any and all such symbols [i.e. flags], or imitations thereof, would be so likely to provoke public disorder or outrage as to furnish legitimate grounds for state regulation"); Monroe v. State Court of Fulton County, 739 F.2d 568, 575 (11th Cir. 1984)("there was no evidence demonstrating the likelihood and imminence of public unrest").

6/ Petitioner's view does not contain any self-limiting principle. It would appear to bar even critical comments about the flag, a position that is directly contrary to this Court's holding in Street v. New York, 394 U.S. 576 (1969).

related contexts that the nation's choice of symbols cannot be forced on its citizens. As this Court stated in its memorable opinion in West Virginia Board of Education v. Barnette, 319 U.S. 624, 632-33 (1943), "[a] person gets from a symbol the meaning he puts into it . . ." More recently, this Court noted in Street v. New York:

> We have no doubt that the constitutionally guaranteed "freedom to be intellectually . . . diverse or even contrary," and the "right to differ as to things that touch the heart of the existing order," encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.

394 U.S. 576, 593 (1969)(quoting Barnette, 319 U.S. at 641-42).7/

7/ The Eleventh Circuit reaffirmed that these fundamental principles of freedom of expression and (continued...)

Withdrawing the flag from public discourse would invite the withdrawal of other focal points of dissent. In recognition that such a step is constitutionally unacceptable, the Texas court made the only determination it could have made in this case: peaceful expression of opinion, whether by symbols or otherwise, may not be suppressed. The doctrine of this Court and of the federal Courts of Appeals supports

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7/ (...continued)
opinion prohibit the state from punishing peaceful acts of flag burning. Monroe, 739 F.2d 568. Relying primarily on Barnette, the Eleventh Circuit held:

> The government has no legitimate interest in compelling an individual to express respect for the flag and what it symbolizes . . . . There is no significant difference between Barnette, in which the government sought to compel the expression of respect toward the flag and this case, in which the government seeks to prevent the expression of disrespect.

739 F.2d at 574 (emphasis in original).

that result. Petitioner has presented no reason warranting review by this Court.

II. PETITIONER HAS NOT IDENTIFIED A CONFLICT AMONG THE CIRCUITS OR THE STATES' HIGHEST COURTS ON THE RELEVANT LEGAL QUESTION

Petitioner's brief fails to identify any current conflict in the lower courts on the First Amendment standards applicable to governmental restrictions on flag burning. Since this Court's decision in Spence, a practical consensus has developed among the lower courts, and that consensus is consistent with the result reached below by the Texas Court of Criminal Appeals.

Respondent is aware of at least four cases since Spence that have reversed criminal convictions for violating flag

desecration statutes.[8/] In each instance, these courts have relied on First Amendment principles established by this Court to arrive at the common conclusion that an individual cannot be penalized for peacefully burning, misusing, or otherwise desecrating a flag as a symbolic political statement. Those cases support the decision below and respondent's position here that the doctrinal question petitioner presents has already been resolved.

In Monroe v. State Court of Fulton County, 739 F.2d 568, the Eleventh Circuit reversed the conviction of a flag-burning

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8/ Respondent is aware of only one post-Spence decision that has upheld a criminal conviction under these circumstances. See Kime v. United States, 673 F.2d 1318 (4th Cir. 1982), cert. denied, 459 U.S. 949 (1982). However, as Justice Brennan noted in dissenting from the denial of certiorari, the lower courts in Kime failed even to address the applicability of Spence. Id. at 954, n.4.

protester who had been prosecuted under a Georgia flag desecration statute. The Monroe court held that the state's interest in protecting the flag as a symbol of the nation could no more justify suppression of the nonverbal flag desecration in the case before it than it could justify suppression of the verbal desecration of the flag at issue in Street, or compulsion of the respectful salute at issue in Barnette. Monroe, 739 F.2d at 574. See also Bowles v. Jones, 758 F.2d 1479 (11th Cir. 1985) (following Monroe to reverse conviction of protester for burning flags at anti-imperialism demonstration).

Similarly, in Cline v. Rockingham County Superior Court, 502 F.2d 789 (1st Cir. 1974), the First Circuit affirmed the grant of a writ of habeas corpus on the ground that "[t]he recent Supreme Court

decision in Spence v. Washington . . . has made it clear that the [flag abuse] statute was unconstitutionally applied to petitioner Cline's activity in the instant case." Id. at 790 (citation omitted). Finally, in United States ex rel. Radich v. Criminal Court of New York, 385 F.Supp. 165 (S.D.N.Y. 1974), the court granted a writ of habeas corpus to reverse the conviction of the proprietor of an art gallery who had been prosecuted for "casting contempt" on the flag by possessing sculptures partly composed of American flags. This judicial consensus is adequate to guide any state or federal court confronting the question that petitioner unnecessarily seeks to present to this Court in this case.

In an effort to create the appearance of unsettled law, petitioner relies on a

series of decisions that predate this Court's opinion in Spence.[9/] See, e.g., Pet. at 19-20, 27, 33-35, 43-46. Petitioner does not and cannot contend that the law in this area is any longer unsettled, and indeed it is not.

III. EVEN IF THE QUESTION PRESENTED WERE NOT ALREADY SETTLED, THIS CASE IS AN INAPPROPRIATE VEHICLE FOR REVIEW BECAUSE THE TEXAS STATUTE IS BOTH ATYPICAL AND PLAINLY UNCONSTITUTIONAL

Even if this Court were to decide that the question presented by petitioner is not settled, it should not address it in this case because respondent was convicted under an unusual flag-desecration statue, the wording of which raises special constitutional problems. The added layer of con-

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9/ Judge Miller's dissent from the decision of the Court of Criminal Appeals similarly relied on cases that are no longer good law.

stitutional difficulty presented by this case would require invalidation of the Texas statute even were the Court to determine that the burning of a flag at a political demonstration is not necessarily protected speech.

The Texas statute under which Johnson was convicted defines prohibited flag desecration not only as defacing, damaging or otherwise mistreating a flag, but also as doing so "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." Tex. Penal Code §42.09(b). In this respect, the statue is unlike most flag-desecration and flag-use restrictions, which commonly describe the prohibited

conduct itself, independent of what onlookers might think of it.10/

Defining the prohibited conduct in terms of the offense that others might take to it amounts to an unconstitutional "heckler's veto." As this Court explained in Street, 394 U.S. at 592, "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are

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10/ See, e.g., 18 U.S.C. §700 (United States statute prohibiting "knowingly casting contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it"); Monroe, 739 F.2d 568 (reviewing Georgia statute providing that "[a] person who deliberately mutilates, defaces or defiles the flag of the United States . . . is guilty of a misdemeanor"); Cline, 502 F.2d 789 (reviewing New Hampshire statute prohibiting alteration of, or display of altered, United States flag); Radich, 385 F.Supp. 165 (reviewing New York statute providing that "any person who . . . [s]hall publicly mutilate, deface, defile or defy, trample upon or cast contempt on [the flag] either by words or act . . . [s]hall be guilty of a misdemeanor").

themselves offensive to some of their hearers." Thus, even if the Court were to hold that the state has asserted interests sufficiently strong to override respondent's First Amendment right to burn a flag in political protest, the state would not be free to invite onlookers to be the ones to decide when respondent's speech should be curtailed.

Basing the permissibility of expression on whether it will "seriously offend" observers is also unconstitutionally vague. A statute that criminalizes conduct in terms so vague that an average citizen must guess at the meaning of those terms violates due process. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1974). The constitutional requirement that a statute clearly delineate what conduct it forbids has special urgency where, as here, the

statute's lack of clarity threatens to chill protected speech. See Smith v. Goguen, 415 U.S. 566, 573 (1974). In this case, the inevitable consequence of the state's failure to define clearly what conduct is deemed seriously offensive is that individuals will steer wide of even potentially prohibited conduct by avoiding all conduct disrespectful of the flag in the fear that it might cause some observer a degree of displeasure that could, conceivably, be described as serious offense. When a vaguely worded statue chills individuals' expression in this way, it causes them to sacrifice more expressive activity than the state constitutionally can impair.11/

11/ For this reason, it also creates substantial overbreadth problems, see Houston v. Hill, 107 S.Ct. 2502 (1987), as the Texas Court of Criminal Appeals properly recognized in its opinion below. App. at 16.

CONCLUSION

For the reasons stated herein, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: September 28, 1988

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-155

In The

Supreme Court of the United States

October Term, 1988

THE STATE OF TEXAS,

Petitioner,

vs.

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
filed July 27, 1988

CERTIORARI GRANTED October 17, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 22, 1984	Offense committed
August 23, 1984	Affidavit and Information filed
December 10, 1984	Trial commenced
December 13, 1984	Conviction rendered; Judgment of trial court entered
February 26, 1985	Johnson's Notice of Appeal given to Court of Appeals for 5th District of Texas
January 23, 1986	Court of Appeals issued Opinion affirming conviction
February 7, 1986	Johnson's Motion for Rehearing filed in Court of Appeals
February 25, 1986	Court of Appeals overruled Motion for Rehearing without further opinion
March 26, 1986	Johnson's Petition for Discretionary Review to Texas Court of Criminal Appeals filed
March 11, 1987	Texas Court of Criminal Appeals granted Johnson's Petition for Discretionary Review
April 20, 1988	Texas Court of Criminal Appeals issued Opinion reversing and remanding case to the trial court with instructions that the indictment be dismissed
May 3, 1988	State filed a Motion for Rehearing with Texas Court of Criminal Appeals
June 8, 1988	State's Motion for Rehearing overruled by Texas Court of Criminal Appeals without further opinion
July 27, 1988	State filed its Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals
October 17, 1988	Certiorari Petition granted

Defendant: Johnson, Gregory Lee Wm/10-21-51
Charge: Desecrate Venerated Obj.
Address: 615 Blvd. S.E. 6, Atlanta, GA 30312
Location: Jail
Filing Agency: DPD
Date Filed: 8-23-84
Court: #7
Complainant: T. K. Stoker MA8446013-H
C/C
Service No. ——— Arrest No.——— I.D. No. ———

AFFIDAVIT

In the Name and by the Authority of the State of Texas.

PERSONALLY APPEARED before me the undersigned authority this affiant, who after being by me duly sworn, deposes and says your Affiant has good reason to believe and does believe that one GREGORY LEE JOHNSON hereinafter styled Defendant, heretofore, on or about the 22nd day of AUGUST A.D., 1984 in the County of Dallas and State of Texas, did unlawfully did on or about August 22, 1984 intentionally and knowingly desecrate a United States of America flag, to-wit: a national flag, in that the said Gregory Lee Johnson did intentionally and knowingly damage and physically mistreat a United States of America flag by burning the said flag in a way that the said Gregory Lee Johnson knew would seriously offend one or more persons likely to observe and discover his action. Against the peace and dignity of the state.

Sworn to and subscribed before me this the 24 day of Aug. A.D., 1984

/s/ J. Muller
Assistant Criminal District Attorney
of Dallas County, Texas

/s/ A. Capps

Affiant.

Defendant: Johnson, Gregory Lee Wm/10-21-51
Charge: Desecrate Venerated Obj
Address: 615 Blvd. S.E. 6, Atlanta, GA 30312
Location: Jail
Filing Agency: DPD
Date Filed: 8-23-84
Court: #7
Complainant: T. K. Stoker MA8446013-H
C/C
Service No. ——— Arrest No. ——— I.D. No.———

INFORMATION

In the Name and by the Authority of the State of Texas.

NOW COMES THE CRIMINAL DISTRICT ATTORNEY of Dallas County, State of Texas, and presents in and to the County Criminal Court #7 of Dallas County, State aforesaid, that one GREGORY LEE JOHNSON hereinafter styled Defendant, heretofore, on or about the 22nd day of AUGUST A.D., 1984 in the County of Dallas and State of Texas, did unlawfully did on or about August 22, 1984 intentionally and knowingly desecrate a United States of America flag, to-wit: a national flag, in that the said Gregory Lee Johnson did intentionally and knowingly damage and physically mistreat a United States of America flag by burning the said flag in a way that the said Gregory Lee Johnson knew would seriously offend one or more persons likely to observe and discover his action. Against the peace and dignity of the state.

/s/ Henry Wade
Criminal District Attorney of
Dallas County, Texas

DALLAS COUNTY, TEXAS
CRIMINAL DOCKET

THE STATE OF TEXAS VS.
JOHNSON, GREGORY LEE

MA84-46013-H/J

Offense: DESECRATE VENERATED OBJ

Date Filed: Aug. 24, 1984

Date	Orders of the Court
9- 5-84	9-11-84 Ann. (def. present) not necessary 9-11-84
9-11-84	11-12-84 Jury
	11-8-84 Hearing on Motions
11- 8-84	11-12-84 TBJ
11-12-84	12-7-84 Pretrial (def. must be present) 12-10-84 T.B.J.
12- 7-84	Pre-trial
12-10-84	Jury trial begun; ev.
12-11-84	Evidence heard
12-12-84	Evidence continued
12-13-84	Jury trial: Verdict—Guilty. Punishment assessed by the jury at 365 days confinement in the County Jail and a fine of $2,000.00 dollars, costs of court. 2 days credit Def. sentenced. Appeal bond $2,000.00 surety or $750 cash.
1- 9-85	Motion New Trial filed
1-25-85	Defendant held to be indigent for purchase of transcript

No. 84-46013-HJ

	) IN THE COUNTY
STATE OF TEXAS	) CRIMINAL
	) COURT
VS.	) NUMBER EIGHT
	) OF DALLAS
GREGORY LEE JOHNSON	) COUNTY, TEXAS

MOTION TO QUASH

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes GREGORY LEE JOHNSON, Defendant in the above entitled and numbered cause, and files this Motion to Quash the Complaint and Information herein for the following good and sufficient reasons, to-wit:

• • •

5.

That the statute upon which the charge herein is based is unconstitutional for the reason that it is too vague and indefinite, in violation of the Constitutions of the United States of America and of the State of Texas.

(deny)

6.

That the statute upon which the charge herein is based is unconstitutional for the reason that it is overbroad, punishing actions protected under the First Amendment of the Constitution of the United States of America and the Constitution and laws of the State of Texas.

(carry)

7.

That the statute upon which the charge herein is based is unconstitutional as applied to Defendant, a protester, in that the alleged act of burning a United States flag at a demonstration to protest the policies of the United States and the national administration, during the period of the national convention of the Republican Party in Dallas to nominate candidates for the offices of President and Vice-President of the United States, was a type of symbolic speech within the purview of the free speech clause of the First Amendment to the Constitution of the United States.

(carry)

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Honorable Court grant this Motion in all things, to Quash the Complaint and Information herein, and order the Defendant discharged.

Respectfully submitted,

/s/ Stanley I. Weinberg
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COOPERATING ATTORNEYS
DALLAS CIVIL LIBERTIES
UNION

VERDICT SHEET

(Guilt/Innocence)

(Use the appropriate form below in returning your verdict:)

We, the Jury, find the Defendant "guilty" as charged in the Information.

/s/ Karen A. Anderson
Foreman

/s/ Karen A. Anderson
(Print Name)

(or)

We, the Jury, find the Defendant "not guilty."

Foreman

(Print Name)

VERDICT OF THE JURY

(Punishment)

Having found the defendant guilty of the offense of desecrating a venerated object, we now assess the punishment of the defendant at 1 (one) year in the County Jail, and a fine of $2,000.00.

We further find that the defendant has never been convicted of a felony and we recommend probation of the following, i. e.:

(1) Jail time.....Yes × No

(2) Fine.....Yes × No

/s/ Karen A. Anderson
Foreman of the Jury

JUDGMENT

	) NO. CCR 84-46013-J
THE STATE OF TEXAS	) IN THE COUNTY CRIMINAL
VS.	) COURT
	) DALLAS
GREGORY LEE JOHNSON	) COUNTY, TEXAS
	) ENTERED:
	) DEC 13 A.D. 1984

On this day, this cause being called for trial, came the Criminal District Attorney for the State of Texas, and came the defendant in person and by his attorney; and the defendant being duly arraigned, pleaded not guilty to the charge contained in the information, to-wit:

DESECRATE VENERATED OBJ, AS CHARGED IN THE INFORMATION

And both parties announcing ready for trial, a jury of six good men and true was duly selected, impaneled and sworn, who, having heard the information read and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, and having heard argument of counsel, retired to consider their verdict, and thereafter returned into the Court in due form of law the following verdict, which was received by the Court, and is here now entered upon the minutes of this Court, to-wit:

"We, the jury, find the Defendant guilty as charged in the information.

/s/ KAREN A. ANDERSON
FOREMAN"

And the defendant having requested the Court that his punishment be assessed by the Court, the jury was discharged, and the Court, having heard further evidence submitted on the issue of punishment, and having heard argument of counsel thereon, assessed the defendant's punishment herein at a fine of $2,000.00 and confinement for 365 DAYS in the county jail.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED, that the defendant is guilty of

DESECRATE VENERATED OBJ, AS CHARGED IN THE INFORMATION

as found by the jury in its verdict herein returned, and that he be punished by a fine of $2,000.00 and confinement for 365 in the Dallas County Jail, and that the State of Texas do have and recover of him all costs in this prosecution expended.

/s/ J. Hendrik
JUDGE

Form ....., Judgment on Jury Verdict of Guilty and Assessment of Punishment by the Court

---

NO. 84-46013-HJ

STATE OF TEXAS — IN COUNTY CRIMINAL COURT NUMBER EIGHT

VS. — DALLAS COUNTY, TEXAS

GREGORY LEE JOHNSON

DEFENDANT'S AMENDED MOTION FOR NEW TRIAL

(Filed February 26, 1985)

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Defendant, GREGORY LEE JOHNSON, with leave of Court first obtained, in the above entitled and numbered cause, by and through his counsel of record, and files this his Amended Motion for New Trial, in support of which the Defendant would show, to-wit:

1.

That the Court committed material error calculated to injure the rights of the Defendant by denying Defendant's Motion to Quash the Complaint and Information in this cause.

2.

That the Court committed material error calculated to injure the rights of the Defendant by not dismissing the charge against Defendant for the reason that the statute upon which the charge is based violates the First Amendment to the Constitution of the United States, on its face, and as applied to the States through the Fourteenth Amendment of the Constitution of the United States.

3.

That the Court committed material error calculated to injure the rights of the Defendant by not dismissing the charge against Defendant for the reason that the statute upon which the charge is based violates Article 1, § 8, of the Constitution of the State of Texas and Article 1.16, Texas Code of Criminal Procedure, on its face.

4.

That the Court committed material error calculated to injure the rights of the Defendant by not dismissing the charge against Defendant for the reason that the statute upon which the charge is based violates the First Amendment to the Constitution of the United States, as applied to the Defendant, a protester involved in symbolic speech protected under the Free Speech clause as applied to the States through the Fourteenth Amendment of the Constitution of the United States.

5.

That the Court committed material error calculated to injure the rights of the Defendant by not dismissing the charge against Defendant for the reason that the statute upon which the charge is based violates Article 1, § 8, of the Constitution of the State of Texas and Article 1.16, Texas Code of Criminal Procedure, as applied to the Defendant, a protester involved in symbolic speech.

• • •

WHEREIN, PREMISES CONSIDERED, Defendant prays that the Court set aside the verdict rendered herein and grant him a new trial.

Respectfully submitted,

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COOPERATING ATTORNEYS
DALLAS CIVIL LIBERTIES UNION

Motion for New Trial Denied.

/s/ J. Hendrik 2-26-85

TRIAL COURT'S RULING ON PRE-TRIAL MOTION TO QUASH

* * *

The Court: I don't think I can rule on Six or Seven until we really hear all of the facts of the case because I believe the cases hold without any question that this statute is not, on its face, unconstitutional. It just may be unconstitutionally applied.

* * *

Then on Six and Seven, what I'll do is I'll carry—carry Paragraph Six and Seven until after—at least until after the State rests—

* * *

—to determine what—whether or not there might be an unconstitutional application in this particular—particular case.

* * *

DEFENDANT'S ORAL MOTION FOR INSTRUCTED VERDICT

(End of State's Case-in-Chief)

Mr. Weinberg: * * *

Number one, * * * the State (sic) (statute), that they're attempting to prosecute the Defendant under is unconstitutional as implied (sic) (applied) under the First Amendment of the Constitution of the United States to a protester.

* * *

this was part of a legitimate political protest during a period of political activity here in Dallas, that the War

Chest Tour was a part of the process involving a political protest;

* * *

under the prevailing authorities and the Supreme Court opinions, that a state's interest in prosecuting, in preventing breaches of the peace, that a failure to show that there was an imminent breach of the peace since this was a police-escorted and monitored demonstration activity that contained political speeches including chants that are all protected under the First Amendment, and the Statute attempted to be applied in this prosecution would be unconstitutional as applied to the Defendant who was involved in the political protest.

We also would argue that the Statute, * * * is overbroad

* * *

Mr. Skemp: The only thing I would add is evidence that the flag burning itself was part of the political expressions.

The fact that the crowd gathered around the flag, the fact that this immediately produced a—an organized chant or responses to it showing disrespect or showing a non-agreement with the policies of the United States and your, "Red, white and blue, spit on you," does not show it to be just an act of anarchy but an organized political activity of these people's parts involved with political expression during the Republican Convention, and under the case of Monroe versus State, Court of Fulton County, it's really undistinguishable.

* * *

Mr. Weinberg: The act of burning a flag at such a demonstration is a type of symbolic speech within the purview of the First Amendment of the Constitution.

* * *

The Court: All right. Deny your request for an instructed verdict.

* * *

Mr. Skemp: And are you also denying the motion to quash the indictment or are you still going to carry that through the rest of the case?

The Court: Yes.

* * *

DEFENDANT'S ORAL MOTION FOR INSTRUCTED VERDICT

(Conclusion of All Evidence)

Mr. Weinberg: At this point in the trial comes the Defendant, * * * all the evidence having been presented, both sides having rested and closed, and reurges his motion for instructed verdict of not guilty, reurging the Constitutional grounds * * * that any burning of the flag that occurred * * * was a—an act of symbolic speech, symbolizing protest against policies of the United States and that application of the Statute * * * in this case would be unconstitutional as applied to the Defendant who had been shown to have been taking part in the demonstration as a demonstrator.

* * *

The Court: * * *

Your motion for instructed verdict is denied, and note your exception.

* * *

Gregory Lee JOHNSON, Appellant,

v.

The STATE of Texas, Appellee.

No. 05-85-00318-CR.

Court of Appeals of Texas,
Dallas.

Jan. 23, 1986.

Rehearing Denied Feb. 25, 1986.

Defendant was convicted in the County Criminal Court No. 8, Dallas County, John C. Hendrick, J., of desecration of a venerated object for burning United States flag during demonstration, and he appealed. The Court of Appeals, Vance J., held that: (1) statute was neither unconstitutionally vague nor overbroad; (2) defendant was not deprived of First Amendment rights; and (3) videotape depicting extraneous conduct of other persons was relevant.

Affirmed.

Stanley I. Weinberg, Douglas W. Skemp, Dallas, for appellant.

John Nation, Dallas, for appellee.

Before VANCE, MALONEY and McCLUNG, JJ.

VANCE, Justice.

Gregory Lee Johnson appeals from a jury trial conviction for desecration of a venerated object. During the

Republican National Convention, Johnson set fire to a United States flag in front of Dallas City Hall, during the course of an anti-Reagan rally. The jury assessed punishment at one year's confinement in county jail and a $2,000.00 fine.

In fourteen grounds of error, Johnson contends that: (1-8) Section 42.09 of the Texas Penal Code violates the First Amendment to the United States Constitution, Article I, Sec. 8 of the Texas Constitution, and Article 1.16 of the Texas Code of Criminal Procedure as an unconstitutional restraint on Johnson's right to free speech; (9) the trial court erred in instructing the jury on the law of parties; (10-11) the trial court erred in admitting into evidence a videotape depicting extraneous conduct of other persons and in refusing to grant a limiting instruction on it; (12) the trial court erred during the punishment stage in admitting, over objection, evidence of Johnson's prior convictions which were never disclosed to Johnson in violation of the trial court's disclosure order; (13) the trial court erred by overruling Johnson's objection to the prosecutor's jury argument during punishment; and (14) the trial court erred in overruling Johnson's objection to the prosecutor's closing argument. Because we find no error, we affirm the judgment of the trial court.

In grounds of error one through eight, Johnson contends that the application of section 42.09 of the Texas Penal Code is unconstitutionally vague, unconstitutionally overbroad, and violative of his first amendment rights. The statute provides:

> (a) A person commits an offense if he intentionally or knowingly desecrates:

(1) a public monument;

(2) a place of worship or burial; or

(3) a state or national flag.

(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.

Johnson claims that the statute is unconstitutionally vague because "desecration" depends upon the sensibilities of persons likely to observe the action. A statute that either forbids or requires the doing of an act in terms so vague that people of common intelligence must guess as to its meaning and differ as to its application lacks the first essentials of due process. *Ely v. State*, 582 S.W.2d 416, 419 (Tex.Crim.App.1979). However, due process merely requires that the law give sufficient warning so that people may conduct themselves so as to avoid that which is forbidden. *McCarty v. State*, 616 S.W.2d 194, 196 (Tex.Crim. App.1981). Due process does not demand that the words used in a statute be specially defined. Words defined in dictionaries and with meanings so well known as to be understood by a person of ordinary intelligence are not to be considered vague and indefinite. *Floyd v. State*, 575 S.W.2d 21, 23 (Tex.Crim.App.1978). Here, the relevant terms of the offense, "deface," "damage," and "physically mistreat" are all well understood terms. The act of burning the United States flag would clearly constitute desecration under the statute.

Johnson also contends that the statute is unconstitutionally overbroad. A statute is overbroad when it prohibits both activity which is protected by the constitution and activity which is not. *Baker v. State*, 478 S.W.2d 445, 448 (Tex.Crim.App.1972). Johnson's argument is without merit. While the flag burning did occur during a political protest rally, the statute in no way prohibited legitimate protest activities.

Johnson further urges that the statute violates his rights to free speech under the First and Fourteenth Amendments. In *Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974), the Supreme Court adopted a two-part analysis for flag desecration cases: the appellate court must determine, first, whether the conduct is protected under the First Amendment; and second, whether, upon the record of the given case, the interests advanced by the state are so substantial as to justify infringement of appellant's constitutional rights. *Monroe v. State Court of Fulton County*, 739 F.2d 568, 573 (11th Cir.1984).

Thus, we must first determine whether Johnson's act of burning the flag is constitutionally-protected free speech. On appeal, the State does not dispute this. Nonverbal expression may be a form of free speech entitled to first amendment protection. *See Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (attaching peace sign to a flag is a form of free speech); *Tinker v. Des Moines School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (wearing black armbands in school is akin to pure speech).

To determine whether Johnson's conduct is entitled to First Amendment protection, we must consider "the nature of appellant's activity combined with the factual con-

text and environment in which it was undertaken." *Spence v. Washington*, 418 U.S. 405, 409-10, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974). If appellant shows "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it," *Spence*, at 410-11, 94 S.Ct. at 2730, then the activity is protected speech under the First and Fourteenth Amendments. *Monroe v. State Court of Fulton County*, 739 F.2d 568, 571 (11th Cir.1984).

Here, Johnson was convicted of burning the United States flag during a public demonstration protesting the policies of President Ronald Reagan and the Republican Party during the 1984 Republican National Convention. The record reflects that Johnson and his fellow protesters participated in anti-Reagan chants and "die-ins," as well as burning the flag in front of Dallas City Hall. This suggests that Johnson intended to convey a particularized message his dissatisfaction with the Reagan Administration's policies, and that this message was very likely to be understood by those who viewed it. *See Monroe v. State Court of Fulton County*, 739 F.2d 568, 572 (11th Cir.1984). Johnson's act was not one of "mindless nihilism." *Spence*, 418 U.S. at 410, 94 S.Ct. at 2730. Therefore, we conclude that Johnson's act of burning the flag constituted symbolic speech requiring First Amendment scrutiny.

Next, we must determine, given the record before us, whether the interests advanced by the State are so substantial as to justify infringement of Johnson's constitutional rights. The State advances two interests: prevent-

ing breaches of the peace and protection of the flag as a symbol of national unity.

The first substantial interest asserted by the State is to prevent breaches of the peace. This is a valid state interest. *Street v. New York*, 394 U.S. 576, 590-92, 89 S.Ct. 1354, 1364-65, 22 L.Ed.2d 572 (1969). Some courts have concluded that an act of flag desecration by itself is insufficient provocation to infringe upon First Amendment rights; they require objective evidence of imminent public unrest. *Monroe v. State Court of Fulton County*, 739 F.2d 568, 575 (11th Cir.1984); *Sutherland v. DeWulf*, 323 F.Supp. 740, 745 (S.D.Ill. 1971). Other courts have held that acts of flag desecration are, of themselves, so inherently inflammatory that the State may act to prevent breaches of the public peace. *Deeds v. State*, 474 S.W.2d 718, 721 (Tex. Crim.App.1971); *Radich v. Criminal Court*, 385 F.Supp. 165, 180-82 (S.D.N.Y. 1974). We choose to follow the Texas Court of Crimina! Appeals in preferring the latter view. Thus, the statute is a legitimate and constitutional means of protecting the public peace.

The second substantial interest asserted by the State is the preservation of the flag as a symbol of national unity. The flag has been held to be a "unifying factor" which "facilitates a citizen's identification with his country." *Monroe*, 739 F.2d at 574. The Texas Court of Criminal Appeals has also found the flag to be a symbol of national unity. *Deeds v. State*, 474 S.W.2d 718, 720-21 (Tex.Crim.App.1971). While the State has no legitimate interest in compelling respect for the flag, *see West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), we disagree with the

Eleventh Circuit in *Monroe* and hold that the State does have a legitimate and substantial interest in protecting the flag as a symbol of national unity. Thus, we hold that section 42.09 is constitutional. Johnson's grounds of error one through eight are overruled.

In his ninth ground of error, Johnson contends that the trial court erred in instructing the jury on the law of parties. The instruction was submitted without objection. Johnson claims the instruction constituted egregious harm because there was no evidence to support this theory. To require reversal the harm must be so egregious as to have denied Johnson "a fair and impartial trial." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim.App.1985). We must look at the degree of the harm in light of the entire jury charge, the evidence and the record as a whole. *Almanza*, 686 S.W.2d at 177.

The State's evidence showed that Johnson burned the flag by himself. The jury charge includes an application paragraph conditioning Johnson's guilt on a finding that he acted alone or as a party. The record reflects that the bulk of the State's argument was premised on Johnson's culpability as a sole actor. Thus, it is unlikely that the jury was misled by the instruction.

Johnson also claims that the instruction impermissibly shifted the burden of proof, citing *Allen v. State*, 686 S.W.2d 685 (Tex. App.—San Antonio, 1985). However this case was decided before *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim.App.1985) and might have been decided differently if analyzed under *Almanza*. Here, the evidence shows more than Johnson's guilt as a party; it shows his guilt as a sole actor. The burden of proof was

not shifted, and no egregious harm occurred. Johnson's ninth ground of error is overruled.

In his grounds of error ten and eleven, Johnson alleges that the trial court erred in admitting into evidence a videotape depicting extraneous conduct of other persons and refusing to give a limiting instruction on it. The trial court admitted a videotape, Exhibit 11, consisting of police and television news films of the protest activities. News commentary was excised from the film, and the videotape was played without any sound. As a general rule, the State is allowed to show the facts and circumstances surrounding the offense, in order to put it in context before the jury. *Jackson v. State*, 575 S.W.2d 567, 570 (Tex.Crim.App.1979). After reviewing the videotape, we do not find it to be inherently prejudicial; we do find it to be relevant to establishing the context of the offense. *See, Maddox v. State*, 682 S.W.2d 563 (Tex.Crim. App.1985). Because the acts of other persons depicted in the videotape were part of the res gestae of Johnson's offense, no limiting instruction was required. *Archer v. State*, 607 S.W.2d 539, 542 (Tex.Crim.App.1980). Johnson's tenth and eleventh grounds of error are overruled.

In his twelfth ground of error, Johnson contends the trial court erred, during punishment, in admitting, over his objection, evidence of Johnson's prior convictions which were never disclosed to Johnson in violation of the trial court's disclosure order. However, Johnson has waived any error regarding this contention due to his failure to seek a postponement or a continuance in response to the unexpectedly offered convictions. *Lindley*

v. State, 635 S.W.2d 541, 544 (Tex.Crim.App.1982). Johnson's twelfth ground of error is overruled.

In his thirteenth ground of error, Johnson complains of error in the prosecutor's jury argument. During his final argument at punishment the prosecutor stated:

> And you know that he's also creating a lot of danger for a lot of people by what he does and the way he thinks. What did Mr. Walker tell you from the evidence he would have done had he been there? He would have tried to stop it. What would the man with a gun on his chest [referring to his tee-shirt's logo] and his running buddies have done to Mr. Walker if he tried to stop it.

Johnson's objection to the argument on the basis that it called for speculation and was unsupported by the evidence was overruled. To require reversal allegedly improper argument must be extreme or manifestly improper or inject new and harmful facts into the record. *Brooks v. State*, 642 S.W.2d 791, 798 (Tex.Crim.App.1982). Here, the prosecutor's argument speculated on the possibility that Johnson's conduct could have led to a breach of the peace. Because the argument did not clearly speculate that Johnson would have committed acts of violence, it is not so manifestly improper as to require reversal. Johnson's thirteenth ground of error is overruled.

In his fourteenth ground of error, Johnson again complains of improper jury argument. During punishment, the prosecutor argued:

> and when you go back into that jury room you represent each and everyone of them; and don't forget it.

Johnson's objection that the argument called for the jury to base its results on community expectations was overruled. The prosecutor further urged the jury to "consider the community effect of your verdict." Johnson's objection to this comment was also overruled. These arguments properly referred to the jury's status as representative of the community as a whole and as such were permissible as proper pleas for law enforcement. *Whittington v. State*, 580 S.W.2d 845, 847 (Tex.Crim.App.1979). Johnson's fourteenth ground of error is overruled.

Because we find no error, we affirm the judgment of the trial court.

Affirm.

Supreme Court, U.S.
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CLERK

No. 88-155

In The
Supreme Court of the United States
October Term, 1988

THE STATE OF TEXAS,
Petitioner,
vs.
GREGORY LEE JOHNSON,
Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR PETITIONER

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QUESTION PRESENTED

DOES THE PUBLIC BURNING OF AN AMERICAN FLAG DURING THE COURSE OF A POLITICAL DEMONSTRATION CONSTITUTE FREE SPEECH SUBJECT TO THE PROTECTION OF THE FIRST AMENDMENT?

LIST OF PARTIES

GREGORY LEE JOHNSON,

Appellant below and Respondent herein

THE STATE OF TEXAS,[1]

Appellee below and Petitioner herein

[1] Texas is represented before this Court by the Dallas County District Attorney's Office. The Texas Attorney General, by letter dated June 13, 1988, authorized the Dallas County District Attorney to prepare the petition in this cause. See Appendix to Brief 1. Reference to Petitioner is by either "Texas" or "the State."

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No. 88-155

In The

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October Term, 1988

THE STATE OF TEXAS,

Petitioner,

vs.

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (Pet. App. 1-27) is reported at 755 S.W.2d 92. The opinion of the intermediate court of appeals (J.A. 18-27) is reported at 706 S.W.2d 120.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals (Pet. App. 1-27) was entered on April 20, 1988. A motion for rehearing was denied on June 8, 1988. (Pet. App. 28, 29). The petition for a writ of certiorari was filed on

July 27, 1988. That petition was granted on October 17, 1988.

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

o

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. I, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . .

U.S. CONST. amend. XIV, § 1, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

TEX. PENAL CODE ANN. § 42.09, in relevant part:

> Desecration of a Venerated Object
>
> (a) A person commits an offense if he intentionally or knowingly desecrates:
>
> * * *
>
> (3) a state or national flag.
>
> (b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
>
> (c) An offense under this section is a Class A misdemeanor.

o

STATEMENT OF THE CASE

Facts Surrounding the Commission of the Offense

On August 22, 1984, during the Republican National Convention in Dallas, Texas, Dallas Police Officer Terry

Stover was assigned to observe a planned demonstration to be held in downtown Dallas. (R.II-57, 58-59). As part of her assignment, Officer Stover, dressed in plain clothes and acting undercover, joined a march called a "War Chest Tour"[2] at Dealey Plaza in downtown Dallas[3] at approximately noon on that day; she moved with the 75 to 100 protesters as they marched through downtown Dallas. (R. II-58-60, 64). During this march, Officer Stover noticed that Respondent Johnson and a woman, Denise Williams, appeared to be the leaders of this group as both encouraged the crowd by use of a megaphone. (R.II-80).

The protesters initially stopped at LTV Tower, entered the building, and conducted a "die-in," an event in which the protesters would count down from ten to one and then fall to the floor, moaning and yelling for approximately three to four minutes. (R.II-71-72). Apparently, this demonstration was designed to represent an atomic attack or explosion. (R.II-161; R.III-258). After conducting this "die-in," the marchers walked through Thanksgiving Square and entered the Republic Bank building where they seized and tore up deposit slips "like confetti," pulled up potted plants, and dumped the soil on the floor. (R.II-73, 74-75, 157).

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[2] The alleged purpose of this tour was to demonstrate against corporations that had some sort of role "in either discriminatory or other sorts of policies that adversely affected other countries: South Africa, Nicaragua, different parts of Central America." (R.III-309). See also Defendant's Exhibit 1. (R.V-833).

[3] A schematic diagram of the area in downtown Dallas where the march occurred was utilized at trial; a photograph of the diagram is contained in the record as State's Exhibit 4. (R.V-822).

The march then moved toward the Diamond Shamrock building. (R.II-76). Evidently knowing in advance of the march, the management locked the doors of this building. (R.II-76). Upon learning this, the protesters beat on the windows and spray-painted the walls and windows of the building. (R.II-76). The group then traveled to the Plaza of the Americas complex. (R.II-79). Here, the marchers again overturned potted plants and spray-painted the floor and walls of the businesses in the complex. (R.II-79). The group then went by way of a skywalk to the Southland Life building; various protesters spray-painted the carpet and walls of the skywalk. (R.II-81). The group proceeded through the Southland Life building to a "little park" where another die-in was conducted. (R.II-81, 82). The march then moved toward the Mercantile National Bank building. (R.II-82).

Officer Stover testified there were three flag poles in front of this building; one bore the American flag. (R.II-83). Protesters bent all three poles. (R.II-83). One protester took down the American flag and gave it to Johnson who "wadded it up and stuck it under his tee shirt." (R. II-83-84).

The protest march next moved through the Neiman Marcus store, where no damage was done, to the Dallas Power & Light Company building, where the doors were locked. (R.II-85). As they had done before, protesters spray-painted on the windows and beat against them with their fists. (R.II-85-86). A short time later, the marchers conducted another "die-in" at the Southwestern Bell Plaza. (R.II-86). During this "die-in," Officer Stover saw Johnson "shooting the finger" with both hands, saying, "Fuck you, America."[4] (R.II-86-87). The march proceeded to the Federal Reserve building, where protesters again spray-painted and beat against the windows of the building with their fists. (R.II-87).

The protesters ended the march in front of Dallas City Hall. (R.II-87-88). There, Officer Stover saw the United States flag being burned while protesters chanted, "America, the red, white and blue, we spit on you." (R.II-91). Officer Stover testified that she was seriously offended by seeing the burning of the flag though she was not able to see who had burned the flag. (R.II-92).

Officer Roland Tucker, an investigator with the Dallas Police Department, was also assigned to observe the march. (R.III-203-205). In his estimation, there were 100-150 protesters at the time he joined the march in progress. (R.III-206-2007). Officer Tucker witnessed an American flag being taken from a flagpole at the Mercantile Bank building by two individuals who then passed the flag to Johnson. (R.III-209). Johnson "rolled it up" and "stuck it up under his shirt." (R.III-210). He testified that he again saw this flag "in front of the city hall being burned on the ground." (R.III-210).

During the portion of the march that Officer Tucker observed, Johnson kept "the crowd moving along" by "chanting with the rest of the group, yelling, cursing" and by moving "from person to person kind of encouraging them to yell with him." (R.III-210). Most of what John-

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[4] Indeed, during the course of the march, Officer Stover heard Johnson shout such slogans as "Fuck you," "Fuck you, America," and "Fuck the Republicans." (R-II-77-78, 91). Officer Stover did not, however, see Johnson personally engage in acts of destruction during the march. (R.II-79, 87, 155-156, 157, 160).

son yelled were profanities—"Fuck you, fuck America, screw everybody"—and he made the gesture "commonly known as shooting the finger" on several occasions. (R. III-211). Officer Tucker saw Johnson in possession of a spray-paint can, but did not actually see him paint on a building or on any of the pillars around the Dallas City Hall. (R.III-213, 214, 238).

When the protesters arrived at City Hall Plaza, Denise Williams spoke to the crowd with the aid of a megaphone. (R.III-239-240). Officer Tucker did not recall exactly what was said. (R.III-244). While Ms. Williams spoke and the crowd chanted, Johnson "pulled out the flag from underneath his shirt." (R.III-243).

Officer Tucker actually witnessed the burning of the flag in front of City Hall. (R.III-217). According to Officer Tucker, a group of about 40 to 50 people encircled the flag. (R.III-216-217). Officer Tucker saw Denise Williams holding one end of the flag and Johnson holding the other end. (R.III-218). Johnson attempted to light the flag with a cigarette lighter but was unable to do so. (R. III-218). Someone in the crowd then handed Johnson a container of lighter fluid. (R.III-219). Johnson "soaked the flag with lighter fluid" and set it on fire with the aid of the cigarette lighter. (R.III-219). Johnson then jumped back into the crowd. (R.III-220).

Officer Tucker was seriously offended by Johnson's actions. (R.III-222). He testified that he pointed out Johnson to "the sergeant over the arrest team" and told him to have Johnson arrested. (R.III-223). Johnson was subsequently arrested. (R.III-249-250).

The charred fragments of the flag were collected by Daniel Walker, an employee of the United States Army

Corps of Engineers. (R.III-268, 270, 271). Members of the press corps, who were covering the march, asked Mr. Walker how he felt when he saw the flag being burned. (R.III-272). Mr. Walker testified that he told these reporters:

> This was the first time that I ever saw the flag burning and I told them I felt what—my feelings, as to I felt that it was—it was an individual and corporate suicide. And they said, "What do you mean by 'corporate?'"
>
> And I said that in every society, those who try to destroy it will usually succeed in destroying themselves . . .

(R.III-273). Mr. Walker buried the remains of the flag in his backyard. (R.III-273-274).

Johnson did not testify in his own behalf in the guilt/innocence stage of the trial. Defense evidence was presented by three witnesses who had been observers of the march for the American Civil Liberties Union. (R.III 295, 377; R.VI-461-462). One witness testified that he did not see the flag being burned, while two witnesses testified that Johnson was not the person who burned the flag. (R. III-324, 394; R.VI-422, 477, 478).

Procedural History of the Case

Johnson was convicted of violating TEX. PENAL CODE ANN. § 42.09(a)(3) (Vernon 1974), sentenced by a jury to one year's confinement in the Dallas County jail and assessed a fine of $2000. (R.I. 2, 3, 52, 59). He appealed to the Court of Appeals for the Fifth District of Texas at Dallas which, on January 23, 1986, affirmed his conviction in a published opinion. *Johnson v. State*, 706 S.W.2d 120 (Tex. App.—Dallas 1986). (J.A. 18-27).

Johnson filed a petition for discretionary review to the Texas Court of Criminal Appeals. That court granted review and, in a 5-4 opinion, reversed the judgment of the intermediate appellate court and remanded the case to the trial court with instructions that the information be dismissed. *Johnson v. State*, 755 S.W.2d 92 (Tex. Crim. App. 1988) (Pet. App. 1-27). That court concluded that § 42.09 (a)(3) was unconstitutional as applied to Johnson and overbroad. (Pet. App. 13, 21). That court's holding was based strictly on the First Amendment.[5] (Pet. App. 2, 7 n. 6).

The Federal Question

The federal question presented by this case was initially raised in a pre-trial motion to quash the information and was reiterated at the conclusion of the State's case-in-chief and again at the close of all the evidence in motions for an instructed verdict. (J.A. 5, 6, 14, 15, 16, 17). This ground was reurged in Johnson's amended motion for new trial, (J.A. 11, 12, 13), in his original appeal to the intermediate court of appeals, and in his petition for discretionary review to the Texas Court of Criminal Appeals. Following rendition of the opinion of the Texas Court of Criminal Appeals, the State filed a motion for rehearing urging error in the court's treatment of this issue. When that motion was overruled, the State petitioned this Court for a writ of certiorari, which was granted on October 17, 1988.

[5] The Texas Court of Criminal Appeals had granted review to determine whether § 42.09(a)(3) violates TEX. CONST. Art. I § 8. (Pet. App. 2). The court stated that it did not address the state law issues because the court of appeals relied on cases which applied only the United States Constitution (Pet. App. 7 n. 6) in "purportedly" addressing both the state and federal constitutional claims. In its opinion, the court of appeals stated that it was addressing the Texas constitutional questions. (J.A. 19). The court overruled the points of error raising those issues. (J.A. 24). While that court relied primarily on federal cases and on *Deeds v. State*, 474 S.W.2d 718 (Tex. Crim. App. 1971), a flag desecration case in which the Texas Court of Criminal Appeals relied solely on federal cases in resolving the constitutional issues, none of the language contained in TEX. CONST. Art. I § 8, see Appendix to Brief 2, requires a different result from what is proper under the First Amendment.

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SUMMARY OF ARGUMENT

This case presents for determination the question of whether an act of flagburning which occurs during the course of a political demonstration is protected under the First Amendment. This important issue of federal law has not been decided by this Court but was reserved in both *Spence v. Washington*, 418 U.S. 405 (1974), and *Street v. New York*, 394 U.S. 576 (1969).

The Constitution does not prevent Texas from defining with substantial specificity what constitutes forbidden treatment of a United States flag. *See Smith v. Goguen*, 415 U.S. 566, 581-582 (1974). The Texas Legislature has enacted § 42.09(a)(3) of the Texas Penal Code to prohibit desecration of the flag in a way that the actor knows will seriously offend persons likely to observe his act. The statute is specifically designed to reach only flagrant acts of flag desecration carried out in a public context.

The State maintains that an act of flagburning does not constitute "speech" entitled to First Amendment protection because the conduct involved is essential neither to the exposition of any idea nor to the peaceful expression of an opinion. The Texas statute is aimed at reaching only the non-communicative aspects of that conduct. The

public burning of a United States flag is exactly the type of conduct prohibited by § 42.09(a)(3).

Texas recognizes that certain forms of non-verbal expression have, in the past, been characterized as "symbolic speech" within the ambit of the First Amendment. A determination that burning an American flag constitutes "symbolic speech" does not automatically render the statute inapplicable. The First Amendment is not absolute and expressive conduct demands less constitutional protection than does "pure speech." A state may forbid or regulate expressive conduct if a sufficiently important governmental interest justifies the incidental limitation on the First Amendment. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968). Throughout the history of this case, Texas has asserted two substantial interests that justify the prohibition against flagrant acts of flag desecration carried out in a public context: 1) protection of the flag as an important symbol of nationhood and unity and 2) prevention of a breach of the peace.

As to the first interest, it is fundamental that the flag of the United States is a unique, important symbol of nationhood and unity. An act of flag desecration which occurs in a public context degrades the symbolic value of the flag and weakens its efficacy to serve as a symbol. Texas has a compelling interest in protecting the physical integrity of the flag so that it may serve as the paramount symbol of nationhood and unity. Protection of the flag may extend to regulating conduct which destroys that symbol, even if an incidental limitation on an individual's First Amendment rights occurs in the furtherance of that interest.

Texas has also enacted § 42.09(a)(3) as a legitimate means of preventing a breach of the peace. Traditionally,

acts of flag desecration, standing alone, are viewed as so inherently inflammatory as to constitute a danger to the public peace. Pursuant to its police power, Texas, by enacting a flag desecration statute, has proscribed a form of conduct which threatens the peace of its citizens. While some courts have looked to the context in which an act of flag desecration occurred for evidence of imminence of public unrest, the facts surrounding the flagburning in this case reveal that it is merely fortuitous that no actual breach of the peace occurred. The absence of an actual breach of the peace is not dispositive because the goal of the statute is *prevention*, not *punishment*, of a breach of the peace.

Moreover, an act of flagburning should not be cloaked with immunity simply because the act occurred at the culmination of a demonstration with political overtones. Section 42.09 does not provide for, nor should the First Amendment countenance, such a "content-based" exception. Since the act may be prohibited, exceptions should not be made for an act performed as part of a political protest.

Section 42.09 may also be considered valid as a "time, place and manner" restriction since it regulates the manner in which an individual may demonstrate. The statute, which prohibits acts of flag desecration regardless of the message sought to be conveyed, if any, is content neutral. The statute is narrowly tailored to prohibit only flagrant acts of flag desecration, *i.e.*, those involving the most serious form of physical abuse, carried out in a public context. The statute does no more than prohibit one form of conduct by which a demonstrator may express himself; there remain abundant alternative avenues of communication by which the same message, if any, may be conveyed.

Contrary to the holding of the Texas Court of Criminal Appeals, the language of § 42.09(b) is not unconstitutionally overbroad. That court reached this conclusion primarily on the basis of that portion of § 42.09(b) which requires that the actor know his act is likely to seriously offend those who observe it. This "serious offense" language is, in fact, a narrowing rather than a broadening of its reach. Section 42.09 is narrowly tailored because it targets and eliminates no more than the exact source of the evil it seeks to remedy. By inclusion of the "serious offense" language, the State criminalizes only those acts which are done in a public context and which are more likely than not to create a breach of the peace. Section 42.09 avoids the problems which were dispositive in *Spence v. Washington* by regulating only the medium by which a message is communicated. There are no alternative means whereby the State can protect the physical integrity of the flag.

ARGUMENT

THE PUBLIC BURNING OF AN AMERICAN FLAG DURING THE COURSE OF A POLITICAL DEMONSTRATION DOES NOT CONSTITUTE FREE SPEECH ENTITLED TO THE PROTECTION OF THE FIRST AMENDMENT.

I.

THE FIRST AMENDMENT IS NOT ABSOLUTE; LIMITATIONS MAY BE PLACED ON THE EXERCISE OF FREE SPEECH.

A.

Even If Expressive Conduct Is Denominated As Speech For Purposes Of The First Amendment, This Classification Does Not Prevent Limitations On Such Expressive Conduct.

At the heart of the First Amendment guarantee of freedom of speech is the "recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine v. Falwell*, 485 U.S. —, 108 S.Ct. 876,879 (1988). Even though the free flow of ideas and opinions is important, it is not absolute "at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568,571 (1942). This Court has long accepted the principle that some forms of expression are not entitled to any protection under the First Amendment, even though they might appear to be protected under its literal language. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973); *Roth v. California*, 354 U.S. 476, 485 (1957).

In the past, this Court has acknowledged that some forms of non-verbal expression may constitute speech entitled to First Amendment protection. *Spence v. Washington*, 418 U.S. 405 (1974) (attaching peace sign to flag); *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. 503 (1969) (wearing black armbands in school); *Brown v. Louisiana*, 383 U.S. 131 (1966) (sit-in by blacks in a "whites only" area to protest a government policy of segregation); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (compulsory flag salute); *Stromberg v. California*, 283 U.S. 359 (1931) (display of red flag). This Court has not, however, accepted the view that there is a limitless variety of conduct which can be labeled "speech" merely because the individual engaging in the conduct intends to express an idea by that conduct. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Rather, this Court has endorsed the view that, pursuant to its responsibility to maintain the public peace and to

promote the welfare of society in general, the government may validly prohibit certain forms of conduct even though such prohibitions may incidentally limit First Amendment rights. *O'Brien*, 391 U.S. at 376 (burning a draft card); *Chaplinsky*, 315 U.S. at 571 (fighting words). This is particularly true when the prohibition is "content neutral," *i.e.*, not intended to promote or restrict any particular idea, philosophy or expression. See discussion pp. 39-41.

B.

Expressive Conduct Is Subject To A Balancing Test In Which The Individual's Right To Free Speech Is Weighed Against The Validity Of The Governmental Regulation Sought To Be Imposed.

It is a well-settled principle that even protected speech is not equally permissible in all places and at all times. *Frisby v. Schultz*, 487 U.S. —, 108 S.Ct. 2495, 2499 (1988), citing to and quoting from *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799 (1985). Sometimes expressive conduct must give way to other societal interests. In order to meet this need, some form of a balancing test is usually employed.

1. *The O'Brien Test*

Often looked to by courts for guidance in this area is *United States v. O'Brien*, wherein a defendant was convicted for burning a selective service registration certificate, commonly known as a draft card, during a demonstration against the Vietnam war and the draft.[6] This

[6] O'Brien admitted to agents of the Federal Bureau of Investigation that he had burned his draft card "because of his beliefs, knowing that he was violating federal law." 391 U.S. at 369.

Court rejected defendant's argument that his conduct constituted "speech" protected by the First Amendment:

> [E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, *a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.*

391 U.S. at 376 (emphasis added). A governmental limitation on otherwise protected speech is justified if it meets the four-part test announced by this Court:

> 1) if it is within the constitutional power of the Government;
>
> 2) if it furthers an important or substantial governmental interest;
>
> 3) if the governmental interest is unrelated to the suppression of free expression; and
>
> 4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377. O'Brien has continued vitality and has been cited with approval in recent cases involving First Amendment questions. *See Wayte v. United States*, 470 U.S. 598, 611 (1985); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984).

2. *The Spence Test*

Another balancing test used on occasion by this Court was set forth in *Spence v. Washington*. *Spence* involved

a conviction under a state statute prohibiting misuse of the United States flag.[7] This Court reaffirmed its statement in *O'Brien* that not all varieties of activity can be labeled as speech simply because the actor intends to convey an idea, but ultimately concluded that defendant's activity constituted a form of symbolic expression subject to First Amendment protection. 418 U.S. at 409-410. It was for this reason that the four-step analysis of *O'Brien* was considered inapplicable.[8] *Id.* at 414 n. 8.

Spence established a two-part analysis which has been utilized in most recent flag desecration cases. Under this analysis, it must be determined 1) whether the conduct is protected under the First Amendment and 2) whether, upon the record of the given case, the interests advanced by the State are so substantial as to justify infringement of an individual's constitutional rights. Both the intermediate court of appeals and the Texas Court of Criminal Appeals applied the *Spence* analysis in deciding this case. (Pet. App. 8-11, J.A. 21-23). If the *Spence* test is utilized in this case, a threshold question for determination is whether Johnson's act of burning a United States flag constitutes unprotected conduct[9] or conduct which may be considered "symbolic speech."

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[7] Spence was not charged under Washington's flag desecration statute. 418 U.S. at 406.

[8] In reaching this conclusion, this Court considered Washington's interest in protecting the United States flag as a symbol of national unity; this Court assumed, without deciding, the validity of this interest. 418 U.S. at 414. In this regard, the *per curiam* opinion noted that, *if* a state has a valid interest in protecting the flag as a symbol, this interest, in the context of activity like that undertaken by Spence, is directly related to expression. *Id.* at 414 n. 8.

[9] For an analysis that Johnson's act constitutes unprotected conduct, see discussion pp. 38-39.

C.

Conduct Which Can Be Characterized As "Symbolic Speech" Demands A Lesser Degree Of Protection Under The First Amendment Than Does Verbal Or Written Communication.

As the State understands the test for "symbolic speech," the conduct in question is considered in combination with the factual context and environment in which the conduct occurred. *See Spence*, 418 U.S. at 409-410. If an individual shows 1) an intent to convey a particularized message and 2) the likelihood was great that the message would be understood by those who viewed it, then the activity may be considered symbolic speech entitled to constitutional protection under the First Amendment. *Id.* at 410-411; *Monroe v. State Court of Fulton County*, 739 F.2d 568,571 (11th Cir. 1984). Both the intermediate court of appeals and the Texas Court of Criminal Appeals found that Johnson's action in burning the flag constituted "symbolic speech."[10] (Pet. App. 8; J. A. 22).

The characterization of Johnson's act as symbolic speech, even if valid, does not bar all governmental regulation. If a compelling societal interest which outweighs an individual's First Amendment rights can be demon-

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[10] The intermediate court of appeals found that Johnson's act of flagburning constituted "symbolic speech" in that it was "intended to convey a particularized message . . . and that this message was very likely to be understood by those who viewed it." (J.A. 22). The Court of Criminal Appeals, in its opinion, adopted this holding, noting that "[g]iven the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed Appellant's act would have understood the message that Appellant intended to convey." (Pet. App. 8-10).

strated, regulation is permitted. As Chief Justice Rehnquist wrote in his dissenting opinion to *Spence:*

> This Court has long recognized . . . that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language. The Court has further recognized that even protected speech may be subject to reasonable limitation when important countervailing interests are involved. Citizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare. *The right of free speech, though precious, remains subject to reasonable accommodation to other valued interests.*
>
> Since a State concededly may impose some limitations on speech directly, it would seem to follow *a fortiori* that a State may legislate to protect important state interests even though an incidental limitation on free speech results. Virtually any law enacted by a State, when viewed with sufficient ingenuity, could be thought to interfere with some citizen's preferred means of expression. But no one would argue, I presume, that a State could not prevent the painting of public buildings simply because a particular class of protesters believed their message would best be conveyed through that medium. Had appellant here chosen to tape his peace symbol to a federal courthouse, I have little doubt that he could be prosecuted under a statute properly drawn to protect public property.

418 U.S. at 417 (emphasis added; citation omitted).

In keeping with these principles, Texas has asserted, throughout the appellate history of this case, two compelling state interests: 1) protecting the United States flag as a symbol of nationhood and national unity and 2) preventing a breach of the peace that could arise from flag-

rant acts of flag desecration carried out in a public context. Each interest will be discussed separately.

II.

THE RIGHT OF THE STATE OF TEXAS TO PRESERVE THE FLAG AS A SYMBOL OF NATIONHOOD AND NATIONAL UNITY IS A COMPELLING STATE INTEREST WHICH SUPERCEDES ANY FIRST AMENDMENT RIGHTS AN INDIVIDUAL MAY HAVE IN EXPRESSIVE CONDUCT.

A.

This Court Has Yet To Answer, In The Context Of A Flag Desecration Case, The Issue of Whether A State Has A Valid Interest In Protecting The Flag As A Symbol Of Nationhood And National Unity.

As previously noted, this Court did not, in *Spence,* specifically address the validity of a state's[11] interest in protecting the United States flag as a symbol of nationhood and national unity. Two factors unique to *Spence* made it unnecessary to address this issue.

First, Washington neither asserted an interest in protecting the flag as a symbol of national unity in the

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[11] Whether Congress has the power to protect the flag as a symbol of nationhood and national unity is not an issue in this case. Congress has enacted both a flag desecration statute, 18 U.S.C. § 700, and a set of rules, the Flag Code, 36 U.S.C. § 173, *et seq.*, setting forth proper etiquette in dealing with the flag. The State acknowledges Congress' authority to legislate in this area. *See United States v. Crosson,* 462 F.2d 96, 99, 101 (9th Cir. 1972), *cert. denied,* 409 U.S. 1064 (1973); *Hoffman v. United States,* 445 F.2d 226, 228 (D.C. Cir. 1971). Congress has not, however, preempted the state's power to legislate in this area. *See* 18 U.S.C. § 700(c).

lower courts nor pursued the matter in argument before this Court. 418 U.S. at 411-412. In contrast, Texas has always asserted that protection of the flag as a symbol of national unity is a legitimate and compelling state interest justifying infringement of any First Amendment rights Johnson may have had. This was specifically recognized by the Texas Court of Criminal Appeals. (Pet. App. 7-8).

Second, Spence was not charged under a flag desecration statute; rather, he was charged under Washington's misuse of a flag statute. *Id.* at 405, 406. The interests underlying these types of statutes are different. In a misuse statute, the apparent interest in protecting the flag as a symbol of nationhood is, as *Spence* acknowledges, concerned primarily with prohibiting use of the flag in a commercial or political context in such a way that it would appear that the government endorsed the message conveyed by the actor. *Id.* at 414. A different interest underlies flag desecration statutes in general and the Texas statute in particular. Through this statute, Texas seeks to prevent dilution of the flag as a symbol capable "of mirroring the sentiments of all who view it," *id.* at 413, by prohibiting its wanton destruction in a public context.

B.

The Notion That A State Has A Valid And Substantial Interest In Protecting The Flag As A Symbol Of Nationhood And National Unity Is Neither New Nor Unusual; Rather, It Is A View Which Has Found Favor With A Variety Of Jurists.

The uniqueness of the United States flag as a symbol was first noted by this Court in *Halter v. Nebraska,* 205 U.S. 34,41 (1907):

> From the earliest periods in the history of the human race, banners, standards, and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not, then, remarkable that the American people, acting through the legislative branch of the government, early in their history, prescribed a flag *as symbolic of the existence and sovereignty of the nation.* Indeed, it would have been extraordinary if the government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation, but a deep affection. No American, nor any foreign-born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free government.

(Emphasis added). Likewise, in *Smith v. Goguen,* a prosecution for improper use of a flag, Justice White characterized the flag as a "monument" entitled to protection:

> It is a fact of history that flags have been associated with nations and with government at all levels . . . It is also a historical fact that flags, including ours, have played an important and useful role in human affairs. One need not explain fully a phenomenon to recognize its existence and in this case *to concede that the flag is an important symbol of nationhood and unity,* created by the Nation and endowed with certain attributes . . .
>
> I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, *without regard to whether such conduct might provoke violence* . . . There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. *The flag is itself a monument, subject to similar protection.*

415 U.S. 566, 586-587 (1974) (White, J., concurring) (emphasis added).

Also in *Smith v. Goguen*, the current Chief Justice, in discussing a state's right to prohibit acts which impair the physical integrity of the flag, detailed in a separate opinion the roles that the flag has played in our history and continues to play in our daily lives:

> From its earliest days, the art and literature of our country have assigned a special place to the flag of the United States.
>
> • • •
>
> No one who lived through the Second World War in this country can forget the impact of the photographs of the members of the United States Marine Corps raising the United States flag on the top of Mount Suribachi on the Island of Iwo Jima, which is now commemorated in a statute at the Iwo Jima Memorial adjoining Arlington National Cemetery.
>
> • • •
>
> The United States flag flies over every federal courthouse in our Nation, and is prominently displayed in almost every federal, state, or local public building throughout the land. It is the one visible embodiment of the authority of the National Government, through which the laws of the Nation and the guarantees of the Constitution are enforced.
>
> • • •
>
> The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry, cannot be fully expressed in the two dimensions of a lawyer's brief or of a judicial opinion . . . the Government may . . . prohibit[ing] even those who have purchased the physical object from impairing its physical integrity. For what they have purchased is not merely cloth dyed red, white, and blue, but also the one visible manifestation of two hundred years of nationhood—a history compiled by generations of our forebears and contributed to by streams of imigrants from the four corners of the globe, which has traveled a course since the time of this country's origin that could not have been "foreseen . . . by the most gifted of its begetters."

Id. at 601-603. A few months later, in his dissenting opinion to *Spence*, the current Chief Justice, in discussing the interests of a state in prohibiting misuse of a flag, summarized his judicial views and those of other Supreme Court Jurists:

> The true nature of the State's interest in this case is not only one of preserving "the physical integrity of the flag," but also one of *preserving the flag as "an important symbol of nationhood and unity."* . . . It is the character, not the cloth, of the flag which the State seeks to protect.
>
> The value of this interest has been emphasized in recent as well as distant times. Mr. Justice Fortas, for example, noted in *Street v. New York*, that "the flag is a special kind of personalty," a form of property "burdened with peculiar obligations and restrictions." Mr. Justice White has observed that "[t]he flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it." I agree. *What appellant here seeks is simply license to use the flag however he pleases, so long as the activity can be tied to a concept of speech, regardless of any state interest in having the flag used only for more limited purposes. I find no reasoning in the Court's opinion which convinces me that the Constitution requires such license to be given.*

418 U.S. at 421-422 (citations omitted; emphasis added). *See also Street v. New York*, 394 U.S. at 605 (Warren, C.J., dissenting); *id.* at 615-617 (Fortas, J., dissenting); *Bowles v. Jones*, 758 F.2d 1479, 1482 (11th Cir. 1985) (Kravitch, J., concurring); *United States v. Crosson*, 462 F.2d 96, 101 (9th Cir. 1972), *cert. denied*, 409 U.S. 1064

(1973); *Monroe v. State Court of Fulton County*, 571 F. Supp. 1023, 1026 (N.D. Ga. 1983), *rev'd*, 739 F.2d 568 (11th Cir. 1984); *Sutherland v. DeWulf*, 323 F.Supp. 740, 745 (S.D. Ill. 1971); *Monroe v. State*, 250 Ga. 30, 295 S.E.2d 512, 514 (1982).

What is readily apparent from a reading of these opinions is that the people of Texas, acting through their elected state representatives, have a unique and compelling interest in protecting the flag as a symbol of our nation. This interest may be furthered by regulating conduct which seeks to destroy, or which actually does destroy, that symbol.

The State of Texas understands the significance of the holding it seeks from this Court. Texas is not asking this Court to recognize the flag as a symbol of "some system, idea, institution, or personality." *Barnette*, 319 U.S. at 632. Rather, the State is asking this Court to recognize the flag as "an important symbol of nationhood and unity,"[12] and to acknowledge that the flag, as the emblem of the United States of America, is worthy of physical protection.

C.

Prohibitions Against Flag Desecration Neither Compel An Individual's Respect For The Flag Nor Prohibit All Forms Of An Individual's Expression Of Disrespect For The Flag.

In *Street v. New York*, Justice Harlan, writing for a bare majority of this Court, held that the rights of the

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[12] *See Spence v. Washington*, 418 U.S. at 421 (Rehnquist, J., dissenting); *Smith v. Goguen*, 415 U.S. at 587 (White, J., concurring).

individual "encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." 394 U.S. at 593. Relying on this statement, Ninth Circuit Judge Browning, in his dissenting opinion in *United States v. Crosson*, a federal prosecution for flag desecration under 18 U.S.C. § 700,[13] wrote that "in *Barnette* the government sought to *compel* the expression of *respect* toward the flag; in this case the government seeks to *prevent* the expression of *disrespect*." 462 F.2d at 105. This view was countenanced in *Monroe v. State Court of Fulton County*, 739 F. 2d at 573 (Georgia's interest in protecting the integrity of the national flag is related to suppression of free speech), and apparently has found favor with Justice Brennan. *See Kime v. United States*, 459 U.S. 949 (1982) (Brennan, J., dissenting from denial of certiorari) (a state's interest in protecting the integrity of the flag as a national patriotic symbol cannot be divorced from political expression).

In considering Texas' interest in preserving the flag as a symbol of nationhood in the context of its flag desecration statute, any comparison to the principles announced in *Barnette* is misplaced. *Barnette* held that a state could not compel the expression of respect for the flag by forcing school children to recite the pledge of allegiance. Section 42.09(a)(3) does not compel expressions of respect for the flag.

An excellent distinction between prohibiting flag desecration and compelling the pledge of allegiance was set forth by Circuit Justice Kravitch in her separate opinion in *Bowles v. Jones*:

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[13] The constitutionality of this statute has never been addressed by this Court.

First, I cannot agree . . . that "there is no significant difference between *West Virginia State Board of Education v. Barnette*, in which the government sought to *compel* the expression of *respect* toward the flag and this case, in which the government seeks to *prevent* the expression of *disrespect*." In my opinion, there is a significant difference. The fact that the state may not force school-children to salute the American flag does not compel the conclusion that the state may not prohibit mutilation or destruction of the flag. The flag-salute law at issue in *Barnette* raised the spectre of totalitarianism, and the Supreme Court's opinion emphasized the law's affirmatively coercive effect:

> Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.
>
> It is also to be noted that the compulsory flag salute and pledge *requires affirmation of a belief and an attitude of mind.*

Barnette, 319 U.S. at 633 (emphasis added; footnote omitted).

The Georgia Flag Misuse Statute, on the other hand, requires no affirmation of any kind with respect to the flag or the values it represents. In my view, therefore, *Barnette* simply does not apply.

758 F.2d at 1480-1481 (Kravitch, J., concurring) (some citations omitted; emphasis in original).

The terms of § 42.09 are not affirmatively coercive; nothing in the statute mandates that Johnson salute the flag, take a pledge or oath to the flag, or make any other expression of respect or belief. Nor does § 42.09 prohibit expressions of disrespect. An individual is free to express

any thoughts he may have concerning the flag, no matter how contemptuous. In fact, Johnson did express his disrespect for the flag and at no time was his expression prohibited. Texas exercised its authority only to punish Johnson for wantonly, intentionally and totally destroying the flag in a public context.

D.

Preservation Of The Flag As A Symbol Of Nationhood And National Unity Can Be Accomplished Only By Prohibiting Severe Physical Abuse Of The Flag, Most Importantly Its Wanton Destruction In A Public Context.

The United States flag is a unique symbol,[14] qualitatively different from any other symbol that this nation uses to express its existence. At half-mast, it reminds us of the death of a president; on the coffins of our soldiers and dignitaries, it reminds us of the sacrifices made to establish and keep this nation; in the hands of a victorious Olympian, it evokes pride in the accomplishments of our citizens; its abuse at the hands of a middle-eastern terrorist kindles our anger and frustration; on the surface of the moon, it drives our hope for the future. It is symbolic of the contractual agreement between the government and every citizen. It stands for the republic,[15] for the principles upon which this country was founded and upon which it continues to exist.

The flag symbolizes the nation for every citizen or would-be citizen. It does not symbolize any one philosophy

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[14] Indeed, Congress has sanctified the flag with a national day of honor. 36 U.S.C. § 157.

[15] See 36 U.S.C. § 172.

or viewpoint. Rather, it symbolizes the unity of one nation composed of people with many differing philosophies and viewpoints. As such, the flag is elevated above any particular political philosophy. Both the federal government and the states have an interest in preserving the flag's physical integrity so that it may survive to represent and symbolize this country and its uniqueness as a governmental entity.

This interest is consistent with the views expressed in *Parker v. Morgan*, 322 F.Supp. 585, 588 (W.D. N.C. 1971):

> We reject plaintiff's argument that because the national flag is a symbol it is always "saying" something, and because it says something control of its display and usage is outlawed by the freedom of speech clause of the First Amendment. The argument is based on a false premise: that what the flag stands for can be authoritatively stated, *i.e.*, that it represents government and/or official policy. If the flag says anything at all, and we agree it often may in a given context, we think it says everything and is big enough to symbolize the variant viewpoints of a Dr. Spock and a General Westmoreland. *With fine impartiality the flag may head up a peace parade and at the same time and place fly over a platoon of soldiers assigned to guard it.*
>
> *The flag has never been a trademark of government.* It is not "official" in the sense that its display is limited to the Army or the Navy or to public buildings or for state occasions. It no more belongs to the President than it does to the most private citizen. It may be flown, and often is, over the YMCA and the Jewish synagogue, the Peace Corps and the Army post, the American Federation of Labor and General Motors. *It belongs as much to the defeated political party, presumably opposed to the government, as it does to the victorious one. Sometimes the flag represents government. Sometimes it may represent opposition to government. Always it represents America—in all its marvelous diversity.*

(Emphasis added). By prohibiting the destruction of the nation's symbol, Texas is not, as its Court of Criminal Appeals suggests, "mandating by fiat a feeling of unity." (Pet. App. 19-20). Texas is not attempting to "prescribe a set of approved messages" to be associated with the flag. (Pet. App. 20). Nor is Texas prohibiting defiant or contemptuous opinions about the flag. Preventing physical destruction of the flag is an interest wholly removed from the prevention of an expression of disrespect. By preserving the flag's physical integrity, so that it may serve as a symbol of nationhood and unity, Texas is not endorsing, protecting, avowing or prohibiting any particular philosophy; rather, Texas is protecting the flag against destruction regardless of the philosophy, political or otherwise, that would motivate such destruction. It is the medium, not the message, which is controlled by § 42.09(a)(3).

E.

Having Shown A Danger That Threatens The Flag As A Symbol Of Nationhood And National Unity, It Is Unnecessary For The State To Show The Existence Of A Grave And Immediate Danger.

In its opinion, the Texas Court of Criminal Appeals holds that, in order to justify protection of the flag as a symbol of national unity, the State must demonstrate a danger to the flag as a symbol:

> *If* the State has a legitimate interest in promoting a State approved symbol of unity, that interest is not

> so compelling as to essentially license the flag's use for only the promotion of governmental status quo. In its brief, the State does not aver why the American flag is in such "grave and immediate danger" of losing the ability to rouse feelings of unity or patriotism such that section 42.09(a)(3) is "essential" to prevent its devaluation into a meaningless piece of cloth. We do not believe such a danger is present. Because *Barnette*, *O'Brien*, and *Boos* would require such a threat in order to uphold violations of federal free speech guarantees, we must hold that the interest of providing a symbol of unity is inadequate to support section 42.09(a)(3).

(Pet. App. 20-21). The fallacy in this reasoning is the assumption that the flag, as a symbol, carries with it one prescribed feeling. The philosophy underlying the preservation of the flag as a symbol of nationhood and national unity is one of tolerance and impartiality. The flag does not represent just one ideology, but rather is above competing ideologies. See discussion pp. 27-29.

If, however, there is some necessity for showing danger, the State maintains that the act of burning a flag is not, in and of itself, inconsequential. Rather, the very nature of the act of destruction is sufficient indicia of potential danger to the flag as a symbol. The flag is no mere piece of cloth; it is not just an aggregation of stars and stripes. It is nothing less than the paramount symbol of our nation. Its wanton destruction in a public context endangers the flag's symbolic value.

III.

TEXAS HAS A LEGITIMATE INTEREST IN PREVENTING BREACHES OF THE PEACE WHICH CAN RESULT FROM FLAGRANT ACTS OF FLAG DESECRATION CARRIED OUT IN A PUBLIC CONTEXT.

A.

One Legislative Purpose Underlying Flag Desecration Statutes Is To Prevent A Breach Of The Peace.

1. *Prevention of breaches of the peace has been recognized as an important and substantial governmental interest unrelated to suppression of expression in the context of flag desecration cases.*

Traditionally, acts of flag desecration are viewed as so inherently inflammatory that a state may regulate the act to prevent a danger to the public peace. *Sutherland v. DeWolf*, 323 F.Supp. 740 (S.D. Ill. 1971) is illustrative of this philosophy. In that case, individuals were charged with publicly mutilating a flag of the United States by burning it. *Id.* at 743. The federal district court recognized that the state has a valid interest in the preservation of the public peace:

> Indeed, the desecration and mutilation of the flag by burning it in a public place *is an act having a high likelihood to cause a breach of the peace.* Taking into account the deeply held and emotional zeal with which so many of our fellow countrymen understandably revere the flag itself, *its public desecration by disrespectful burning is an act of incitment and as fraught with danger to the public peace* as if a person would stand on the street corner shouting derogatory remarks at passing pedestrians. . . . *the public mutilation of the flag is an act which is likely to elicit a violent response from many who observe such acts.*

Id. at 745 (citation omitted; emphasis added). In *People v. Street*, 20 N.Y.2d 231, 229 N.E.2d 187,191, 282 N.Y.S.2d 491 (1967), *rev'd, Street v. New York*, 394 U.S. 576 (1969), Chief Justice Fuld of the New York Court of Appeals expressed a similar view:

> It (the flagburning) was an act of incitement, literally and figuratively "incendiary" and as fraught with danger to the public peace as if he (the flagburner) had stood on the street corner shouting epithets at passing pedestrians. The State may legitimately curb such activities in the interest of preventing violence and maintaining public order.

(Citation omitted). Indeed, as early as 1907, this Court recognized the inciteful impact of flag desecration in *Halter v. Nebraska*,[16] wherein Justice Harlan said as follows: "It has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." 205 U.S. at 41.

The State's interest in preventing a breach of the peace by prohibiting certain acts of flag desecration has been recognized as being unrelated to the suppression of free expression. *See People v. Sutherland*, 9 Ill. App. 3d 824, 292 N.E.2d 746,748 (1973), *appeal vacated and remanded sub nom, Sutherland v. Illinois*, 418 U.S. 907 (1974).[17] That

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[16] Admittedly, *Halter* v. Nebraska is not a flagburning case. Rather, *Halter* involved a prosecution for using representations of the flag on beer bottles for advertising purposes. 205 U.S. at 38.

[17] Four justices dissented from the order of remand and "without further briefing and oral argument would affirm judgment." 418 U.S. at 907. On remand, the Illinois Court reached the same conclusion. *People* v. *Sutherland*, 29 Ill. App.3d 199, 329 N.E.2d 820 (1975), *appeal dism'd sub nom, Sutherland* v.

(Continued on following page)

court stated that "desecration of the flag by burning it in a public place is highly likely to cause a breach of the peace." 292 N.E.2d at 749. *See also People v. Radich*, 26 N.Y.2d 114, 257 N.E.2d 30,35-36, 308 N.Y.S.2d 846, (1970), *aff'd*[18] *per curiam sub nom, Radich v. New York*, 401 U.S. 531 (1971), wherein the New York Court held that flag desecration statutes are "aimed at keeping the public peace" even though the court also stated that "violations of the flag desecration statute will probably not occur apart from the expression of an idea." 257 N.E.2d at 36.[19] In the case at bar, the intermediate court of appeals chose to adhere to this view, holding that § 42.09 (a)(3) is a "legitimate and constitutional means of protecting the public peace." (J.A. 23).

2. *The facts of this case support Texas' interest in preventing a breach of the peace even if* ***Texas must demonstrate "imminence" or a "clear and present danger"*** *of public unrest.*

Some courts have concluded that an act of flag desecration, in and of itself, is insufficient to justify abridgement of an individual's First Amendment rights; these courts require evidence that demonstrates the imminence of public unrest or evinces a clear and present danger of a breach of the peace. *Monroe v. State Court of Fulton*

(Continued from previous page)

Illinois, 425 U.S. 947 (1976). The appeal was dismissed for want of a substantial federal question; three justices indicated a willingness to note probable jurisdiction and set the case for oral argument. *Id.*

[18] The case was affirmed on appeal by an "equally divided court" with one justice not participating.

[19] *But see United States ex rel. Radich v. Criminal Court of New York*, 385 F.Supp. 165, 183-184 (S.D.N.Y. 1974) (a subsequent habeas corpus proceeding in the same case).

County, 739 F.2d at 575 (flagburning during a political demonstration);[20] *Cline v. Rockingham County Superior Court*, 367 F.Supp. 1146,1151-1153 (D. N.H. 1973), *aff'd*, 502 F.2d 789 (1st Cir. 1974) (peace symbol penned in ink on a flag sewn on a blanket draped over defendant's shoulders); *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318,1323 (1973) (display of a flag on the seat of defendant's jeans); *State v. Kool*, 212 N.W.2d 518,521 (Iowa 1973) (display of a flag in a window behind a peace symbol); *People v. Von Rosen*, 13 Ill.2d 68, 147 N.E.2d 327, 329 (1958) (magazine illustration depicting young woman nude except for large hat, sunglasses and a piece of cloth which looked exactly like the U.S. flag covering pubic area). To the State's knowledge, no case has clearly enunciated what must be shown to prove that breaches of the peace are either likely or imminent as a result of flag desecration.

The Texas Court of Criminal Appeals held that no actual breach of the peace occurred and that the situation in which Johnson burned the flag was not "potentially explosive." (Pet. App. 13). Contrary to that holding, the facts of this case demonstrate a potential for a breach of the peace which clearly justifies the application of § 42.09 (a)(3) to Johnson's actions. While it is true that no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning, Johnson did not "peacefully" burn the flag. Rather, the flag was burned at the climax of a turbulent, destructive and potentially

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[20] Even *Monroe* recognized that the State clearly has a valid interest in preventing a breach of the peace that *might arise* from certain acts of flag desecration. 739 F.2d at 575. *See also Crosson v. Silver*, 319 F.Supp. 1084, 1088 (D. Ariz. 1970).

violent demonstration, which had attracted a sizeable crowd. See Statement of the Case. The act took place in front of Dallas City Hall, undoubtedly a public place "over which the state by necessity must have certain supervisory powers unrelated to expression." *Spence*, 418 U.S. at 411.[21] Violations of the law had already occurred. Charges of criminal mischief under TEX. PENAL CODE ANN. § 28.03 (Vernon 1974), theft under TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1988), and disorderly conduct under TEX. PENAL CODE ANN. § 42.01 (Vernon 1974 and Vernon Supp. 1988), for example, could doubtless have been brought against those protesters identified as the perpetrators of those offenses.

The situation in this case is totally distinguishable from the minimum risk of a breach of the peace present in *Spence*,[22] where defendant briefly displayed an altered flag from his window. There was no evidence in *Spence* that anyone other than the arresting officers had even seen the display. 418 U.S. at 409. Crucial to the decision in *Spence* was this Court's finding that no state interest had been *sufficiently impaired* by defendant's activity to support the conviction. *Id.* at 412-415. Indeed, when all separate opinions in *Spence* have been read, one senses that a majority of this Court was of the opinion that Wash-

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[21] The State's interest in preventing a breach of the peace for an action occurring on public property is clearly different from the state's interest in *Spence* since *Spence* considered misuse of a flag which was displayed on private property.

[22] The factual situation presented in this case is closer to the act of flagburning in *Street v. New York*. This Court chose to reverse Street's conviction on grounds other than his act of flagburning; indeed, this Court expressed no opinion on the constitutionality of Street's conviction for the act of flagburning, but rather reserved the question. 394 U.S. at 594.

ington had unwisely applied the misuse of a flag statute to defendant Spence. *Id.* at 416 (Burger, C.J., dissenting).

The record in the case at bar, unlike *Spence*, sufficiently reflects imminence of public unrest so as to justify the application of the statute. Johnson's actions, which were not merely peaceful expressions of an opinion, could well have been rewarded by an immediate physical reaction from others opposed to his act[23] or could have led to further, possibly more violent demonstrations by his fellow protestors. It is merely fortuitous that no undue public disorder or unrest actually occurred.

B.

The Texas Court Of Criminal Appeals, By Mandating Evidence Of Actual Violence Before Permitting State Regulation, Has Adopted A Standard Which Has Not Been Previously Applied And Which Is Stricter Than Is Warranted By First Amendment Considerations.

The purpose of flag desecration statutes in general, and § 42.09 in particular, is the *prevention* of a breach of the peace as opposed to a *punishment* for a breach of the peace. By requiring *actual*[24] as opposed to potential violence before a prosecution for desecration of the flag may be initiated, the Texas Court of Criminal Appeals has

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[23] Indeed, James Harrington, an observer for the Texas ACLU, testified that he "stayed there to watch the fellow (Daniel Walker) that was picking it (the flag) up that moved into the crowd because I thought that that *might be a source of conflict.*" (R.III-323).

[24] Indeed, at least one court has held that an actual breach of the peace is not essential to a conviction since the "physical act of burning a United States flag is conduct which could reasonably be expected to provoke a breach of peace." *State v. Farrell*, 209 N.W.2d 103, 107 (Iowa 1973), *vacated and remanded*, 418 U.S. 907 (1974) (for further consideration in light of *Spence*).

adopted a standard stricter than that warranted by First Amendment considerations. As a practical matter, the Texas Court of Criminal Appeals criminalization of an act of flag desecration becomes dependent on the reaction of those witnesses to the desecration. If those observers exercise self-control, no crime is committed; on the other hand, if "tempers flare and fists fly," the flag desecration is punishable.

The court's ruling mandates a heavier burden of proof than the First Amendment requires and obviates the need for a flag desecration statute. The maximum that should be required under the "imminence" or "clear and present danger" standard is for the prosecution to introduce objective evidence that demonstrates the potential for a breach of the peace. The trial prosecutor adequately met this burden of proof since the record clearly reflects that a breach of the peace was more likely than not. See Statement of the Case.

IV.

THE FACT THAT JOHNSON'S ACT OF FLAG-BURNING OCCURRED AT THE CLIMAX OF A POLITICAL DEMONSTRATION DOES NOT CLOAK HIS ACT WITH GREATER PROTECTION SINCE NO EXCEPTION APPLIES TO § 42.09 FOR AN ACT OF POLITICAL PROTEST.

A.

An Act Of Political Protest, Even If Expressive, Is Entitled To No Greater Protection Than Any Other Act Which Violates A Valid State Statute.

As Justice Fortas wrote in his dissenting opinion to *Street v. New York*: "Protest does not exonerate lawless-

ness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest." 394 U.S. at 617. In *City Council of Los Angeles v. Taxpayers for Vincent*, Justice Stevens recognized that: "To create an exception for . . . political speech and not . . . other types of speech might create a risk of engaging in constitutionally forbidden content discrimination." 466 U.S. at 816. The Constitution does not require that an exception be made for prohibited activities to which an individual might ascribe some political significance. To extend the same protection afforded to the spoken and written word to all "actions which happen to be conducted for the purpose of 'making a point' is to stretch the Constitution not only beyond its meaning but beyond reason, and beyond the capacity of any legal system to accommodate." *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting). Action, even if clearly for political protest purposes, is not entitled to the same protection given speech alone; action may be subjected to reasonable regulation that takes into account the competing interests involved. *Street v. New York*, 394 U.S. at 616 (Fortas, J., dissenting).

B.

Johnson's Act Of Publicly Burning A United States Flag, Even If Politically Motivated, Clearly Constituted Conduct Which Texas May Proscribe.

It is the prerogative of the Texas legislature to prohibit overt physical acts that it deems offensive and/or

harmful to society; this is true even if some speech aspects are involved. The appropriate line of demarcation comes between "ideas and overt acts." *See Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring). Indeed, § 42.09(a)(3) does not, on its face, prohibit speech at all; rather, the prohibitions are directed solely to overt physical acts and are designed to prohibit only those acts involving severe physical abuse of flags carried out in a public context.

If the act of burning a United States flag has communicative aspects, it is clearly speech "brigaded with conduct." Texas has a right to regulate the non-speech aspects involved in burning a United States flag. The public destruction by fire of a United States flag is exactly the type of conduct which is prohibited under any construction which could be given § 42.09.

1. *Section 42.09(a)(3) is "content neutral."*

The Texas statute is clearly "content neutral."[25] A "content neutral" speech regulation is justified because it is without reference to the content of the regulated speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Under a flag desecration statute, the act of flagburning is

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[25] A "content-based" speech regulation would be one wherein government grants the use of a forum to people whose views it finds acceptable but denies the same forum to those who wish to express less favored or more controversial views. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986), citing *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). The fact that the statute is "content neutral" should further distinguish this case from *Boos v. Barry*, 485 U.S. —, 108 S.Ct. 1157 (1988); see discussion pp. 46-48.

prohibited regardless of the message, if any, that the actor seeks to convey.

This premise was recognized in *Joyce v. United States*, 454 F.2d 971, 989 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972), a case involving the constitutionality of the federal flag desecration statute, 18 U.S.C. § 700: "The statute proscribes *certain distinctive acts* whether they are associated with any particular expression of views which may be popular or unpopular with any group or individual." The Texas statute does not prohibit the "casting of contempt" on the flag; one can heap abuse on the flag either verbally or in writing. It is only the most severe acts of physical mistreatment which § 42.09(a)(3) proscribes.

Application of § 42.09(a)(3) does not depend on whether the flag is burned for communicative or for non-communicative purposes, nor does it depend upon whether a particular message, political or otherwise, is sought to be conveyed. It does not depend on whether the flag desecration is respectful or contemptuous. Thus, whether the flag is burned out of an act of treason or patriotism, love or hate, satisfaction or dissatisfaction with any particular governmental personnel or policy, the physical act of burning the flag remains prohibited.

This Court has held that "content neutral" time, place and manner regulations are acceptable so long as they 1) are designed to serve a substantial governmental interest and 2) do not unreasonably limit alternative avenues of communication. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (a municipal zoning ordinance prohibiting adult movie theaters from locating their business within 1,000 feet of residential property,

church, park or school was upheld to be a proper "time, place and manner" regulation which did not violate the First Amendment); *Clark v. Community for Creative Non-Violence*, 468 U.S. at 293 (a National Park Service regulation prohibiting camping in Lafayette Park was not violative of the First Amendment even though it worked a hardship on individuals participating in a demonstration which was intended to call attention to the plight of the homeless); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981) (a Minnesota State Fair rule which restricted the sale or distribution of any merchandise, including written or printed material, to a fixed location did not violate the First Amendment). The First Amendment does not guarantee to any individual the right to communicate his views in any manner that may be desired. *Heffron*, 452 U.S. at 647. The prohibition against destruction of a flag removes merely one manner of possible expression from the otherwise limitless arsenal available to any protester. The statute in no way prohibits legitimate protest activities. Abundant alternative avenues of communication utilizing the flag remain.

2. *There remain alternative avenues of communication.*

This premise was recognized in *United States v. Crosson*, a prosecution under 18 U.S.C. § 700, where the Ninth Circuit said as follows:

> Clearly, the restriction on appellant's First Amendment freedoms is no greater than is essential to the furtherance of the national interest. She has not been deprived of a forum for expressing her dissent, but rather denied the use of the flag for contemptuous physical destruction.

462 F.2d at 102. Likewise, Johnson was not banned from expressing his dissent in a variety of other ways. He was afforded not only an opportunity but a forum in which to express his views. He was able to participate and did, in fact, participate in a lengthy demonstration. He was able to verbally express, by slogans, chants and obscenities, his opinions. Nor was Johnson prohibited from using the flag for protest purposes; he could, for example, have carried the flag during the demonstration or used it as a prop or backdrop while making a speech.

3. *To allow an act of flagburning to go unpunished because it occurred in the context of a political protest creates a "content based" exception to the statute.*

The Texas Court of Criminal Appeals found that Johnson's act of flagburning constituted "symbolic speech" *when considered in the context in which it arose.* (Pet. App. 8-10). Indeed, the court concluded that Johnson's act was political and therefore could not be punished since it fell "within the protections of the First Amendment;" the court expressed no view "as to whether the State may prosecute acts of flag desecration which do not constitute speech under the First Amendment." (Pet. App. 21). The court's conclusion that Johnson's act was protected has the effect of creating an exception under § 42.09(a)(3) for acts that occur as part of a political protest or for acts with an incidental political message. Even assuming that there is some way to clearly define what is "political" and what is not, by allowing § 42.09 to be avoided where "political" speech is involved, the court has itself re-drafted the statute and removed its content-neutrality.

V.

THAT PORTION OF SECTION 42.09(b) WHICH REQUIRES THAT THE ACTOR KNOW HIS ACTIONS WILL SERIOUSLY OFFEND IS NOT UNCONSTITUTIONALLY OVERBROAD.

A.

The Language Of § 42.09(b) Narrowly Tailors The Statute To Punish Only Flagrant Acts Of Flag Desecration Carried Out In A Public Context.

The Texas Court of Criminal Appeals reviewed the language found in the definition of "desecrate," § 42.09(b), which includes the provision that the desecration be done "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." The court noted that this provision is a step toward "narrowly tailoring"[26] the statute to serve a significant governmental interest (Pet. App. 12), but went on to find that this language was "so broad" that it could be used to "punish protected conduct which has no propensity to result in breaches of the peace" because "serious offense" will not always result in a breach of the peace. (Pet. App. 13). The court concluded that since "serious offense" could not be equated with incitement to breach of the peace the statute was overbroad. (Pet. App. 13).

There are a number of fallacies with this reasoning. First, the court assumes the act of flagburning is protected conduct and, second, the court's reasoning tends to

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[26] As the State understands this principle, a statute is considered to be "narrowly tailored" if it targets and eliminates no more than the exact source of the evil it seeks to remedy. *Frisby v. Schultz*, 108 S.Ct. at 2502, citing to *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. at 808-810.

mandate an actual breach of the peace before Texas may proscribe the act of desecration. Both of these fallacies have already been discussed in greater detail. Third, the court erred when it attempted to equate "serious offense" with an actual breach of the peace or with incitement to a breach of the peace. The error lies in the assumption that serious offense must necessarily occur for § 42.09(a)(3) to be violated. This is not the case. While it is undisputed that the record in this cause established that serious offense did, in fact, result from Johnson's act of flagburning, the absence of such evidence would not necessarily have acquitted Johnson.

The "serious offense" language of the statute refers to an individual's intent and to the manner in which the conduct is effectuated, not to the reaction of the crowd. Enforcement of the statute does not depend on an assessment of the sensibilities, or on the unfettered discretion, of those who observe a flagburner's conduct. Section 42.09(b) reaches only those severe acts of physical abuse of the flag carried out in a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals. As such, this is a legitimate effort to "narrowly tailor" the statute to pass constitutional muster.

Additionally, the "serious offense" clause is specifically designed to avoid *Spence*-type applications. Section 42.09(b) does not regulate the content of the message, if any, sought to be conveyed but rather goes to the manner in which the conduct is effectuated. Through § 42.09(b), the statute is designed to regulate flag desecrations that

occur in a public context and have, inherently, the potential for creating unrest.

Comparison to *Spence* may be useful in underscoring this distinction since it is clear that Spence could not have been prosecuted under the Texas statute at issue. Spence displayed his privately owned flag on private property, 418 U.S. at 408-409; Johnson burned a flag, which in all probability was taken from the Mercantile Bank building's flagpole, on public property. Spence testified that he utilized removable tape to form the peace symbol on the flag because he did not wish to damage the flag, *id.* at 409; Johnson soaked the flag with lighter fluid and ignited it with the aid of a cigarette lighter. There was no evidence in *Spence* that anyone other than the arresting officers saw the flag display, *id.*; Johnson burned the flag in the midst of a crowd of protesters, police and other observers.

By focusing on the offensive nature of the mistreatment of the flag, § 42.09(b) is also designed to distinguish between acts done in private and those done in public and thus avoid "the confusion of the public-private distinction." *See Renn v. State*, 495 S.W.2d 922, 923 (Tex. Crim. App. 1973). Moreover, § 42.09(b) is clearly not intended to apply to a situation where a worn flag is discarded. Rather, the statute permits latitude for the honorable retirement of a flag from service that is no longer fit for public display. *See* 36 U.S.C. § 176(k). Nor does the statute, by its very terms, criminalize accidental or unintentional damage to a flag.

There is no question under the facts of this case that Johnson's act of publicly burning a United States flag was done in a manner intended to cause serious offense. His actions were unquestionably within the prohibited

zone of conduct proscribed by § 42.09(a)(3) and (b). The statute targeted and eliminated exactly the evil intended by the legislature, *i.e.*, the desecration of a flag in a public context carried out in a manner having a high potential for creating unrest.

B.

There Is No Legislative Alternative To Section 42.09 Which Justifies The Conclusion That It Is Unconstitutionally Overbroad.

As support for its conclusion that § 42.09 is overbroad, the Court of Criminal Appeals stated that "the existence of another legislative alternative which would further the goal of the challenged statute may be used to prove that the challenged statute is overbroad." (Pet. App. 14). This "standard" was set forth without citation to authority, though the court claims to be guided by *Boos v. Barry*, 485 U.S. —, 108 S.Ct. 1157 (1988). The Texas court found the statute overbroad because it related to "a breach of the peace" which is generally prohibited by TEX. PENAL CODE ANN. § 42.01 (Vernon 1974 and Vernon Supp. 1988). Section 42.01 proscribes disorderly conduct and essentially covers the "fighting words" exception to the First Amendment. *See Houston v. Hill*, 482 U.S. —, 107 S.Ct. 2502,2510 n. 10 (1987).

Sections 42.01 and 42.09 are neither interchangeable nor duplicative. Section 42.01 does not proscribe the destruction of specific property designated by the legislature as a venerated object and § 42.09, in turn, does not proscribe "fighting words" or any other form of pure speech. Indeed, had Johnson been prosecuted for disorderly conduct[27] under § 42.01, he would have had a legitimate argument that his conduct did not constitute a crime under that statute and that he should have been prosecuted under § 42.09 which covers his conduct specifically. *See* TEX. GOV'T CODE ANN. § 311.026 (Vernon 1988).

Additionally, the Texas court's reliance on *Boos* for the proposition that the existence of a "less restrictive alternative" constitutes constitutional overbreadth *per se* is inappropriate. *Boos* involved a prosecution under a District of Columbia ordinance prohibiting, in part, the display of any sign that tended to bring a foreign government into "public odium" or "public disrepute" within 500 feet of a foreign embassy located within the District. The D.C. ordinance was compared with an analogous federal statute—18 U.S.C. § 112(b)(2)—which applied to diplomatic personnel outside of the District of Columbia. This Court noted that § 112 originally contained anti-picketing provisions which were deleted in 1976, leaving only a prohibition against intimidating, coercing, threatening or harassing a foreign official, and that "the District of Columbia government has responded to the congressional request . . . by repealing" the municipal ordinance contingent upon congressional action to extend 18 U.S.C. § 112 (b)(2) to the District of Columbia. "Relying on congressional judgment in this delicate area," this Court then concluded that the availability of alternatives such as § 112 demonstrated that the display clause was not crafted with sufficient precision to withstand First Amendment scrutiny. The fact that an alternative was in the process

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[27] The record does reflect that Johnson was initially charged with disorderly conduct; within hours of his arrest, this charge was dropped. (R.IV-564-565).

of adoption appears to have been central to this Court's decision.

This, however, is not the situation with respect to the Texas statute at issue. Section 42.01 covers a broad range of disorderly conduct, including fighting words, which tend to incite a breach of the peace while § 42.09(a)(3) deals with overt physical acts of flag desecration. Desecration is defined in detail and is limited to certain enumerated conduct. Thus, § 42.09 is narrowly tailored to fit specific conduct—in this case, the prevention of the desecration of a flag by publicly burning it in a manner likely to seriously offend. Because § 42.01 does not address the same basic interest as § 42.09, § 42.01 cannot be deemed to be a "less restrictive alternative."

C.

The "Serious Offense" Language Of § 42.09(b) Can Be Excluded And The Remainder Of The Statute Given Effect Under A Savings Construction.

Even though the Texas Court of Criminal Appeals found the language of the "serious offense" clause overbroad, the remainder of the statute could have properly remained in effect if the court had applied a savings construction, placing a period after the word "mistreat" and deleting the remaining portion of § 42.09(b). This would have been consistent with TEX. GOV'T CODE ANN. § 311.032(c) (Vernon 1988), which states, in pertinent part:

> If any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that *can be given effect without*

> *the invalid provision* or application, and to this end the provisions of the statute are severable.

(Emphasis added). Section 42.09 can be given effect without the "serious offense" language. Because § 42.09 contains no provision that declares it to be non-severable, deletion of the serious offense language would not affect the enforceability of the remainder of the statute. An individual still would be criminally liable for the act of defacing, damaging or physically mistreating a flag or other venerated object. The statute still would be narrowly tailored to serve the legitimate governmental interests of Texas in protecting the physical integrity of the flag.[28]

The Texas Court of Criminal Appeals, however, did not consider this option. Instead, it ignored the requirement that the overbreadth doctrine be applied only as a "last resort" and only where there is no room for a savings construction. *See Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. —, 107 S.Ct. 2568, 2572 (1987). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Because the Texas court did not address the possibility of a savings construction, this Court could remand this

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[28] A "blanket prohibition" of the manner of speech may still be "narrowly tailored" if in each case the manner of speech forbidden necessarily produces the evil the government seeks to eradicate. *Frisby v. Schultz*, 108 S.Ct. at 2502-2504; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. at 808-810. The "blanket prohibition" on flag desecrations is still narrowly tailored to a government interest, *i.e.*, either the prevention of a breach of the peace inherently likely to occur as a result of flagrant acts of flag desecration or the preservation of the physical integrity of our national symbol.

case for determination of that issue. The Texas Court of Criminal Appeals is empowered to answer questions of state law certified from a federal appellate court. TEX. CONST. Art. V § 3-c; TEX. R. APP. P. 214. *See Houston v. Hill*, 107 S.Ct. at 2517. (Powell, J., concurring in part and dissenting in part). It is doubtful that this procedure would be helpful to this Court because the Texas court has given its answer to the overbreadth challenge. It merely has not considered the viability of a savings construction. *Cf. Houston v. Hill.* This Court is in as good a position to determine the savings construction issue as is the Texas court, and the State of Texas would urge this Court to proceed to a determination of this issue in favor of the statute.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment of the Texas Court of Criminal Appeals be, in all respects, reversed.

Respectfully submitted,

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APPENDIX

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THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 13, 1988

Ms. Kathy Drew
Assistant District Attorney
7th Floor, County Courthouse
Dallas, Texas 75202

Re: *Johnson v. State*
No. 372-86

Dear Ms. Drew:

This letter serves to inform you that (1) the Attorney General will not file a petition for certiorari to review the above decision of the Court of Criminal Appeals and (2) the Attorney General has authorized the Dallas County District Attorney's Office to file such petition.

If you have any questions, do not hesitate to call me at (512) 463-2080.

Sincerely,

(Signed) CHARLES A. PALMER
Assistant Attorney General
Assistant Chief, Enforcement
Division

CAP/br

TEX. CONST. ART. 1 § 8

§ 8. *Freedom of speech and press; libel*

Sec. 8. Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libel, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

[redacted]

[redacted]

THE STATE OF TEXAS,

Petitioner,

[redacted]

GRADY LEE NELSON,

Respondent.

[redacted]

[redacted]

[redacted]

QUESTIONS PRESENTED

1. Whether Tex. Penal Code Ann. § 42.09(a)(3), which penalizes such "physical mistreat[ment]" of "a national flag" as the actor "knows will seriously offend one or more persons likely to observe or discover his action," facially violates the First and Fourteenth Amendments to the United States Constitution.

2. Whether Tex. Penal Code Ann. § 42.09(a)(3), as applied to the peaceful burning of an American flag at an overtly political demonstration, an act of symbolic speech closely akin to pure speech, violates the First and Fourteenth Amendments to the United States Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-155

THE STATE OF TEXAS,

Petitioner,

—against—

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Introduction

The issue in this case is whether the State of Texas (hereinafter "Texas" or "the State") can inflict criminal penalties for the peaceful burning of a flag during a political demonstration, under a statute that proscribes such "physical mistreat[ment]" of the flag as "the actor knows will seriously offend one or more persons likely to discover his action." The Texas Court of Criminal Appeals, measuring its own state statute against the First and Fourteenth Amendments to the United States Constitution, held the statute unconstitutional as applied to Mr. John-

son's constitutionally protected expression. This Court should affirm.

Statement of Facts

On August 22, 1984, during the Republican National Convention in Dallas, Texas, a political demonstration entitled the "Republican War Chest Tour" culminated in the burning of a flag of the United States in front of Dallas City Hall. Respondent Gregory Lee Johnson was subsequently convicted under Texas Penal Code § 42.09(a)(3), which prohibits "Desecration of a Venerated Object." He was sentenced to one year in prison and a $2,000 fine. The statute under which Mr. Johnson was convicted classifies "a state or national flag" as a "venerated object," and defines "desecrate" as follows:

> 'desecrate' means deface, damage or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

Tex. Penal Code Ann. § 42.09(b) (Vernon 1974).[1] Under the judge's instructions to the jury, Mr. Johnson could be convicted if he himself desecrated the flag, or if he "encourage[d]" another person to commit the offense.[2]

A. The Demonstration

The Republican War Chest Tour demonstration, which was authorized in advance by the Dallas Police, (R.II-71-72), was overtly political in character. Indeed, Texas concedes this. Pet. Br. i, 3 n.2; *see also* (R.II-160-61). Literature distributed during the demonstration explained that it was designed to protest the policies of the Reagan Administration and of certain American

1 Tex. Penal Code Ann. § 42.09(a)(3) incorporates this definition, and therefore the statute will be referred to hereinafter as § 42.09(a)(3).

2 The instruction, known as the "law of parties," provided that "a person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." (R.I-49).

corporations located in Dallas, and included a list of fourteen political slogans to be chanted during the demonstration. Def. Exh. 1,2 (R.V-833-34). The slogans included: "Reagan, Mondale, which will it be? Either one means World War III"; "Ronald Reagan, killer of the hour, Perfect example of U.S. power"; and "Red, white & blue we spit on you, You stand for plunder, you will go under." *Id.* Other chants and speeches criticized the C.I.A.'s role in Nicaragua, corporate investment in South Africa, and police brutality. (R.III-314,354). The demonstration was punctuated by "political theater," including several "die-ins" designed to dramatize the results of a nuclear war. (R.IV-423, III-258).

The demonstration marched through the streets of Dallas, stopping briefly at various corporate locations along the way. It culminated at Dallas City Hall, where the group burned a flag while chanting political slogans critical of the United States. (R.III-355, II-90-91). The Texas Court of Criminal Appeals noted that the burning was peaceful and led to no violence. (Pet. App. 3). After the flag was burned, the demonstration concluded. (R.III-322).

Texas has recounted in some detail its witnesses' version of the demonstration. Pet. Br. 2-6. Its brief recounts testimony alleging that, at various points in the demonstration prior to the flagburning, bank deposit slips were torn up, potted plants were uprooted, a flag was stolen, walls were spray-painted, and "obscenities" were directed at the United States and the Republican Party. *Id.* This testimony is irrelevant, however, for Mr. Johnson was neither prosecuted nor convicted for any such conduct.[3]

B. The Trial

Texas's attempt in its brief to taint Mr. Johnson by his association with the unproven acts of others is consistent with its

3 Indeed, Texas's own witnesses testified that, apart from his alleged role in the flagburning, Mr. Johnson neither engaged in nor encouraged others to engage in any activities beyond shouting so-called "obscenities" and knocking on glass doors. (R.II-44, 87, 155-57, 185).

tactics at trial. The prosecutor repeatedly referred to the shirt Mr. Johnson was wearing at trial, which featured the name of the Revolutionary Communist Youth Brigade (the youth group of the Revolutionary Communist Party), as if to suggest that Mr. Johnson's association with such a political group supported a finding of guilt. (R.III-327-28, IV-429) The prosecutor twice referred to Mr. Johnson's shirt in his closing argument, and condemned the organization as "a group of anarchists." (R.V-641,707).

The prosecutor also focused the jury's attention on the words the group chanted while the flag burned. He asked Police Officer Terri Stover whether "they ha[d] occasion to be saying anything at the time that [the flag] was burning?" (R.II-90). She replied that she recalled a rhyme, "America, the red, white, and blue, we spit on you," (R.II-91), and "Fuck America." (R.II-90). He asked Police Officer Roland Tucker the same question, again focusing on the chanting of "Red, white, and blue, we spit on you." (R.III- 215). Later, he noted that a demonstration leaflet containing that chant bore the initials of the Revolutionary Communist Youth Brigade, and asked whether that chant "encouraged disrespect for the flag." (R.IV-423-27).

Two police officers testified at trial that they had observed the flagburning, and that it had "seriously offended" them.[4] The prosecution offered no evidence, however, that Mr. Johnson knew that the flagburning was likely to seriously offend anyone.

Several legal observers trained by the American Civil Liberties Union who observed the demonstration testified that Mr.

4 Officer Stover testified that she was seriously offended because "I've seen a lot of bad things, but nothing that, I don't know, that shows quite that much respect being torn up like that." (R.II-91). Officer Tucker explained that he was seriously offended because "burning the flag shows disrespect for the country." (R.III-261). In addition, an Army Corps of Engineers employee, Daniel Walker, testified that the burning "deeply offended" him, again because it communicated a lack of respect for the flag. (R.III-272,276-80). No evidence was submitted that anyone other than these governmental employees was "seriously offended" by the flagburning.

Johnson did not burn the flag, but that they had seen another person commit the act. (R.III-320, IV-476-78). Mr. Johnson did not testify at trial, but his attorney introduced exhibits explaining the political nature of the demonstration, and witnesses for both the State and the defense agreed that the entire demonstration, including the flagburning, was explicitly political in character. (R.III-380-90, II-160).[5]

The prosecutor's closing argument began by condemning the group with which Mr. Johnson demonstrated as:

> some people who weren't local here, some people who came to protest what was going on and who I submit from the evidence, had different intentions than to make this city or this country sparkle.

(R.V-640). He then criticized the Revolutionary Communist Youth Brigade by name, (R.V-641), referred to Mr. Johnson's shirt bearing the Brigade's name, and repeated the testimony about the property destruction that occurred along the march (R.V-643-45), none of which Mr. Johnson was accused of. He concluded by stating:

> if you look at this evidence from start to finish, the participating in the beginning, the literature, the last notations [R.C.Y.B.], the shirt, who he is, the chanting, the yelling, the megaphone, the encouragement, the having the [mega]phone, being there, wanting this to happen, there is no question he encouraged it at all. He's guilty as sin as far as the law of parties is concerned.

(R.V-707-08).

The jury found Mr. Johnson guilty. A sentencing hearing was then held, at which Mr. Johnson testified at length. The

5 In addition, Mr. Johnson gave a summation to the jury, in which he made clear the political nature of the expression:

> The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a [juxtaposition]. We had new patriotism and no patriotism.

(R.V-656).

prosecutor, in his summation to the jury prior to sentencing, characterized Mr. Johnson as "the kind of man that believes in phrases such as—and I'm quoting—'Fuck America.' That's what he thinks of your country." (R.V-808). He argued that Mr. Johnson poses "a lot of danger for a lot of people by what he does and the way he thinks." (R.V-810).

The jury sentenced Mr. Johnson to one year in prison, and imposed a $2,000 fine. The Court of Appeals for the Fifth District of Texas at Dallas affirmed the conviction in an opinion by then-Judge John Vance, now counsel for Texas. *Johnson v. State*, 706 S.W.2d 120 (Tex. App.-Dallas 1986) (JA 18-27).[6]

C. The Decision of the Texas Court of Criminal Appeals

The Texas Court of Criminal Appeals[7] granted discretionary review of Mr. Johnson's conviction and reversed it, holding that Tex. Penal Code Ann. § 42.09(a)(3) was unconstitutional as applied to his activity. (Pet. App. 1-27).[8] The court first found that Mr. Johnson's acts constituted symbolic speech, because, in the context of "an organized demonstration, speeches, slogans, and the distribution of literature," it was clear that "by burning the flag, appellant 'intended to convey a particular message . . . and that this message was very likely to be understood by those who viewed it.' " (Pet. App. 8-10).

The court then examined the State's two asserted interests for the statute—preventing breaches of the peace and preserving

6 After the Texas Court of Criminal Appeals reversed Mr. Johnson's conviction on First Amendment grounds, the Attorney General declined to file a petition for certiorari. However, he permitted Mr. Vance, who had become the Dallas County Criminal District Attorney, to file such a petition, in effect to defend his own prior opinion. (Pet. Br. App. 1).

7 The Texas Court of Criminal Appeals is the State of Texas's highest court for criminal appeals. *See, e.g., City of Houston v. Hill*, 107 S. Ct. 2502, 2517 (1987) (Powell, J., concurring in part and dissenting in part).

8 The court addressed only Mr. Johnson's federal constitutional challenge, because it concluded that the lower appellate court had not addressed his claim that the statute and his conviction thereunder violated the Texas Constitution. (Pet. App. 7 n.6).

the flag as a symbol of national unity. With respect to the first, it construed the flag desecration statute as extending far beyond breaches of the peace:

> [S]ection 42.09(a)(3) is so broad that it may be used to punish protected conduct which has no propensity to result in breaches of the peace. 'Serious offense' does not always result in a breach of the peace . . . One cannot equate 'serious offense' with incitement to breach the peace.

(Pet. App. 13). The court also noted that the State had a less restrictive means for preventing breaches of the peace, for Tex. Penal Code Ann. § 42.01 directly addresses incitements to immediate breaches of the peace. (Pet. App. 14-16).[9] Therefore, the court held that, "as it relates to breaches of the peace, [§ 42.09(a)(3)] is too broad for First Amendment purposes." (Pet. App. 16).

With respect to the State's asserted interest in preserving the flag as a symbol of national unity, the court concluded that it is impermissible for the State to prescribe, through criminal legislation, a single meaning for the symbol of the flag:

> Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to present.

(Pet. App. 19-20).

9 Section 42.01 provides, in pertinent part:

> (a) A person commits an offense if he intentionally or knowingly:
>
> (1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;
>
> (2) makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace.

Tex. Penal Code Ann. § 42.01 (Vernon 1974 and Supp. 1987), reproduced at Pet. App. 30.

This Court granted certiorari to review the Texas Court of Criminal Appeals' decision on October 17, 1988.

SUMMARY OF ARGUMENT

This case presents the question whether, consistent with the First and Fourteenth Amendments to the United States Constitution, a state can criminally convict a person of peacefully burning a flag in an overtly political demonstration, under a statute that hinges punishment on the act's communicative effect on third persons "likely to observe or discover" it.

Mr. Johnson maintains that Tex. Penal Code Ann. § 42.09(a)(3) is unconstitutional both on its face and as applied to the symbolic speech for which he was convicted. As this Court held forty-six years ago when confronted with another statutory regulation of respect for the flag, the dual principles of freedom of expression and government by the people prohibit the State from mandating respect for its icons by imprisoning those who express disrespect. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 640-42 (1943).

a. Section 42.09(a)(3) must be analyzed under the same First Amendment analysis applicable to "pure" speech, because it singles out conduct for punishment solely on the basis of its communicative effect, namely, that which "seriously offends." The less stringent test articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), is inapplicable, because neither the statute nor the State's interests are "unrelated to expression."

b. Section 42.09(a)(3) is facially unconstitutional, first, because it imposes a viewpoint-based restriction on political expression. Texas explicitly asserts that its interest is to promote one view—that the flag is a symbol of nationhood and national unity. The First Amendment, however, mandates viewpoint-neutrality, and accordingly Texas may not "prescribe what is orthodox" concerning the flag's symbolic meaning by prohibiting private persons from using private flags to express opposing points of view. *Barnette*, 319 U.S. at 642.

c. However, as in its previous flag misuse and desecration cases, the Court may continue to reserve the question whether a state may proscribe flagburning *per se*. Because § 42.09(a)(3) singles out conduct that will "seriously offend one or more persons," the statute violates the First Amendment's prohibition on content-based discrimination, and its invalidation is compelled by this Court's recent decision in *Boos v. Barry*, 108 S. Ct. 1157 (1988). The First Amendment forbids the proscription of expression on the basis of the likely hostile reactions of an audience, and the asserted state interests—to preserve the flag as a symbol of nationhood and to prevent breaches of the peace—do not justify § 42.09(a)(3)'s infringement of First Amendment freedoms.

d. Third, and again whether or not a state may proscribe flagburning *per se*, § 42.09(a)(3) is unconstitutionally vague and overbroad. It is vague because it requires one who seeks to "physically mistreat" the flag to place himself or herself in the shoes of wholly unidentifiable third persons in order to gauge whether they will be "seriously" offended, an impossible inquiry. And because the First Amendment protects "seriously offen[sive]" expression, the statute's prohibition casts an impermissibly wide net over clearly protected First Amendment activity.

e. Even if the Court concludes that § 42.09(a)(3) survives a facial challenge, it must nonetheless affirm the Texas Court of Criminal Appeals' conclusion that it is unconstitutional as applied to Mr. Johnson. Mr. Johnson was convicted for peacefully burning a flag in an overtly political demonstration, clearly protected expression. Moreover, it appears that his conviction may have rested in part on his words and associations, and not solely on the flagburning.

The subject matter of this case—desecration of the national flag—stirs strong emotions precisely because of the flag's

unique symbolic power. But as this Court recognized in *Barnette*, 319 U.S. at 642, that fact only underscores the need for constitutional protection of this form of expression: "Freedom to differ is not limited to things that do not matter much. . . The test of its substance is the right to differ as to things that touch the heart of the existing order."

ARGUMENT

I. SECTION 42.09(a)(3) MUST SATISFY STRICT FIRST AMENDMENT SCRUTINY BECAUSE IT PROHIBITS CONDUCT SOLELY ON THE BASIS OF ITS COMMUNICATIVE IMPACT

Texas and amici devote considerable effort to arguing that a reduced standard of First Amendment scrutiny should be applied in this case because of the nature of Mr. Johnson's activity. Pet. Br. 12-19; Amici Br. of Washington Legal Foundation at 3-5, 17-23. This argument is misconceived. Where, as here, both the statute on its face and the State's interests are expressly directed not to a particular physical act, but to the act's communicative effect, traditional First Amendment scrutiny applies.

The statute under which Mr. Johnson was convicted, Tex. Penal Code Ann. § 42.09(a)(3), does not prohibit all flagburning or use, but only that which the "actor knows will seriously offend one or more persons likely to observe or discover his action." Thus, the statute singles out for prohibition only such conduct as will have a "seriously offen[sive]" communicative impact on others.

Because § 42.09(a)(3) conditions punishment solely on the conduct's communicative impact, its facial constitutionality can be resolved without categorizing the flagburning in this case as speech or conduct.[10] As then-Judge Scalia explained in his

10 Mr. Johnson vigorously maintains that the flagburning at issue in this case was protected symbolic expression, but that determination is necessary only for his "as applied" challenge. *See* Section III, *infra*.

dissent in *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (1983) (en banc), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the critical inquiry is not whether a given action is conduct or speech, but whether the government's statute is directed at the action's communicative nature:

> freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.

703 F.2d at 622 (Scalia, J., dissenting) (original emphasis); *see also* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1497-98 (1975). The Court has consistently held violative of the First Amendment statutes "aimed precisely at the communicative effect of . . . conduct." 703 F.2d at 624 (citing cases). Section 42.09(a)(3) is such a statute, and is therefore subject to traditional First Amendment scrutiny.

For the same reason, the inquiry set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), does not apply. Where the government's interest is "directly related to expression . . . the four-step analysis of *United States v. O'Brien* is inapplicable." *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974); *Kime v. United States*, 459 U.S. 949, 952-53 (1982) (Brennan, J., dissenting from denial of certiorari); Ely, *Flag Desecration*, 88 Harv. L. Rev. at 1484, 1496-97. Here, both the statute on its face and the government's asserted interests are directly related to the suppression of expression.[11]

11 The statute on its face proscribes only that conduct which communicates a message that "will seriously offend" others. The State's asserted interest in preserving the flag as a symbol of national unity is specifically aimed at the communicative effect of flag desecration, which the State asserts will undermine the State's exclusive symbolic

II. SECTION 42.09(a)(3) IS UNCONSTITUTIONAL ON ITS FACE

A. Section 42.09(a)(3) Punishes Speech Solely On The Basis Of Its Viewpoint

Section 42.09(a)(3) prohibits individuals from "mistreat-[ing]" any "state or national flag," whether privately or publicly owned.[12] Texas states that its interest in proscribing flag desecration is to promote its view that the flag is a "symbol of nationhood and national unity" deserving of great respect, and to forbid "mistreat[ment]" of the flag which challenges that view. Pet. Br. 19-24. On the face of the statute and that interest alone, § 42.09(a)(3) is unconstitutional.[13]

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meaning for the flag. And the State's interest in preventing breaches of the peace is aimed at the allegedly provocative content of the message communicated. *Monroe v. State Court of Fulton County*, 739 F.2d 568, 574-75 (11th Cir. 1984); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. 29, 53-57 (1973); Ely, *Flag Desecration*, 88 Harv. L. Rev. at 1497.

In *O'Brien*, the Court found that Congress's interest in an efficient registration system was unrelated to the communicative nature of the act proscribed, draft-card burning. The Court expressly distinguished those situations, as here, where "the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *O'Brien*, 391 U.S. at 382; *see also Buckley v. Valeo*, 424 U.S. 1, 17 (1976); *Community for Creative Non-Violence v. Watt*, 703 F.2d at 625 (Scalia, J., dissenting).

12 The fact that the statutory prohibition extends even to use of a privately-owned flag obviously distinguishes this statute from one designed to proscribe "the act of burning a courthouse to protest a judicial decision, or the act of burning a ROTC building to protest the Vietnam War." Amicus Br. of Legal Affairs Council at 6.

13 The phenomenon of flag desecration statutes was unknown to the Framers. Great Britain has never enacted legislation prohibiting flag descration, and prior to 1896, no state legislation existed compelling respect or veneration for the American flag. D. Manwaring, *Render Unto Caeser: The Flag Salute Controversy* 2-3 (1962).

(*Footnote continued*)

The First Amendment requires the government to maintain strict viewpoint-neutrality. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Statutes designed to suppress expression on the basis of its viewpoint are therefore presumptively invalid:

> [T]here are some purported interests—such as a desire to suppress support for . . . an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule. The general principle . . . is that *the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.*

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (emphasis added).

Section 42.09(a)(3) impermissibly favors the State's viewpoint that the flag is a "symbol of nationhood and national unity" at the expense of all other views. Persons who believe that the flag symbolizes oppression or imperialism, and therefore deserves disrespect, are forbidden from expressing that viewpoint through physical "mistreat[ment]" of even privately-owned flags. Those who seek to celebrate the viewpoint sanctioned by the State, however, may burn the flag, so long as they do so ceremoniously.[14]

Indeed, the first American flag was designed, not as the quasi-sacred symbol of national unity that Texas describes, Pet. Br. 20-22, but merely as a protective signal that the four vessels of the infant American Navy were not pirate ships. B. Tuchman, *The First Salute* 48-49 (1988).

14 Texas's argument that persons can still express dissent through other means, Pet. Br. 42, is unavailing. First, " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the

Indeed, because the "proper" way to dispose of a flag is to burn it "in a dignified way," 36 U.S.C. § 176(k), all flag desecration statutes are likely to be at least implicitly viewpoint-based. Ely, *Flag Desecration*, 88 Harv. L. Rev. at 1502-03, 1504 n.90. The State will not want to prohibit all burning of the flag, and thus must single out for prohibition only those acts of burning which are disrespectful, or contemptuous, or "seriously offen[sive]," *i.e.*, those that express an impermissible viewpoint.

From a First Amendment standpoint, § 42.09(a)(3) is indistinguishable from the viewpoint-based statute struck down in *Schacht v. United States*, 398 U.S. 58 (1970). That statute prohibited actors from wearing Army uniforms in any way that would "tend to discredit" the Army. The Court held the statute unconstitutional because under it an actor "was free to participate in any skit at the demonstration that praised the Army, but . . . could be convicted of a federal offense if his portrayal attacked the Army instead of praising it." 398 U.S. at 63. Similarly, here, Mr. Johnson presumably would have been free to burn the flag in a ceremonious fashion in order to demonstrate respect for the symbol, but was convicted because his alleged burning showed disrespect for the flag.

Texas's attempt to cast its statute in viewpoint-neutral terms only underscores the extent to which the statute and the State's underlying interests are viewpoint-based. It contends that it is not "prohibiting defiant or contemptuous opinions about the flag," but only protecting "the flag's physical integrity, so that it may serve as a symbol of nationhood and unity." Pet. Br.

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plea that it may be exercised in some other place.' " *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (*quoting Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)). Second, this statute selectively relegates to "other means" only those who seek to express a viewpoint in opposition to the State's view of the flag.

29.[15] But § 42.09(a)(3) does not neutrally prohibit all destruction of the flag's physical integrity; it singles out only those acts which constitute "mistreat[ment]" *and* "will seriously offend one or more persons." Moreover, it makes no sense to assert that an interest in preserving the flag "as a symbol of nationhood and unity" is "not endorsing, protecting, avowing, or prohibiting any particular philosophy." Pet. Br. 29. Texas is protecting the philosophy that the flag symbolizes "nationhood and unity," and proscribing persons who seek to burn it or otherwise deface it precisely to question that for which it stands.

This Court's decisions regarding flag regulation make abundantly clear that the requirement of viewpoint-neutrality bars the government from utilizing criminal sanctions to compel respect for the flag. As far back as 1943, the Court held that compulsory flag salutes violate the First Amendment. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624. Justice Jackson, writing for the Court, recognized that the flag plays a patriotic role, but held that under the First Amendment, patriotism cannot be compelled. 319 U.S. at 641. The First Amendment was designed to forestall the dangers that result when government abandons viewpoint-neutrality and attempts to coerce respect by forbidding dissent:

> Those who begin coercive elimination of dissent soon find themselves eliminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard . . . the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

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15 *See also* Amicus Br. of Legal Affairs Council 16-17 ("the justification for the statute clearly and plainly has nothing to do with the content of speech. The obvious justification is to prevent destruction or defacement of objects that the people of Texas have decided should not be destroyed or defaced."); Amici Br. of Washington Legal Foundation 3-4 ("the statute merely proscribes certain destructive and damaging conduct, regardless of whether the desecrator intended thereby to convey any message, political or otherwise").

319 U.S. at 640-41.[16]

Twenty-six years later, in *Street v. New York*, 394 U.S. 576 (1969),[17] the Court relied on *Barnette* to hold that the State violates the mandate of viewpoint-neutrality when it criminalizes contemptuous speech about the flag in order to preserve respect for the flag as the national symbol:

> 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.'

16 A vivid example confirming Justice Jackson's warning is reflected in the history of Germany's flag desecration statutes. The rise of Naziism coincided with increasingly broad prohibitions against desecration of state symbols. The Kaiser's flag desecration statute provided:

> Anyone who maliciously removes, destroys, injures or commits insulting mischief on a public emblem of the authority of the Empire, or of a federal sovereign, or an emblem of the majesty of a federal state, shall be punished by a fine up to 600 Shillings, or by imprisonment with labour up to two years.

G. Drage, *Criminal Code of the German Empire*, § 135 (Novella of 1876) at 223 (1885).

In 1932, the statute was amended to provide:

> Whoever publicly profanes the Reich or one of the states incorporated into it, its constitution, colors or flag or the German armed forces, or maliciously and with premeditation exposes them to contempt, shall be punished by imprisonment.

(December 19, 1932, RGB 1-I, 548) reproduced in United States War Dept. Pamphlet No. 31-122, *Statutory Criminal Law of Germany*, § 134a, at 95 (August 1946).

In 1935, Adolf Hitler broadened the German statute as follows:

> Whoever publicly profanes the German National Socialist Labor Party, its subdivisions, symbols, standards and banners, its insignia or decorations or maliciously and with premeditation exposes them to contempt shall be punished by imprisonment.

(June 28, 1935) reproduced in United States War Dept. Pamphlet No. 31-122, *supra*, at 96.

17 Mr. Street was convicted for publicly burning an American flag while proclaiming, "If they let that happen to [civil rights activist James] Meredith, we don't need an American flag." 394 U.S. at 590.

394 U.S. at 593 (*quoting Barnette*, 319 U.S. at 642). In *Spence v. Washington*, 418 U.S. at 412-13,[18] the Court applied the same reasoning to a statute penalizing *nonverbal* "improper use" of the flag.

Thus, whether one is compelled to respect a flag by saluting it or by observing a series of taboos concerning its use or misuse, the compulsion is viewpoint-based, and is presumptively unconstitutional in a society which declares itself dedicated to political toleration.

B. The "Seriously Offend" Clause Of Section 42.09(a)(3) Proscribes Expression Solely On The Basis Of Its Communicative Content, And The State's Asserted Interests Do Not Justify Its Infringement Of Expression

Even if the Court does not find § 42.09(a)(3) viewpoint-based, it must nonetheless find it unconstitutionally content-based, for the statute's "seriously offend" clause hinges punishment on the intended communicative impact of an individual's act. This content-based restriction is not justified by the asserted state interests.

1. The "Seriously Offend" Clause Of Section 42.09(a)(3) Is Content-Based

Section 42.09(a)(3) provides that defacing, damaging, or physically mistreating the flag will be punished only where the communicative content of the action is such that the actor knows will "seriously offend" others. Whether or not the act is proscribed thus turns on the effect its message has on third parties. *See* Section I, *supra*.

The First Amendment prohibits such content-based prohibitions. *Boos v. Barry*, 108 S. Ct. 1157, 1163 (1988); *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 537 (1980). In *Boos*, the Court struck down a statute barring the "display [of] any sign within 500 feet of a

18 Mr. Spence was convicted for displaying a flag with a peace symbol attached to it, in opposition to the United States' invasion of Cambodia. 418 U.S. at 406-08.

foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.' " 108 S. Ct. at 1160. The Court found the statute "content-based," and therefore subject to the strictest First Amendment scrutiny, because it focused "on the direct impact of speech on its audience." 108 S. Ct. at 1163-64; *id.* at 1171 (Brennan, J., concurring in part and concurring in the judgment). Like the statute in *Boos*, the "seriously offend" clause in § 42.09(a)(3) premises punishment not on any particular physical act, but only on those physical acts that have a particular "direct impact . . . on [the] audience," namely, those that "will seriously offend" others.

Assuming *arguendo* that this provision draws any definable line, *see* Section II.C., *infra*, it is one this Court has consistently held unconstitutional, for it effectively creates a "heckler's veto." "The public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. at 592. This is because a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). In order to ensure that the dispute-inviting function of expression is not impaired, even "seriously offen[sive]" speech is protected.[19]

Thus, the Court has routinely struck down statutes that punish speech or other expressive activity based solely on the likely effect the activity will have on listeners. In *Terminiello*, it struck down a "breach of the peace" ordinance which punished speech that "stirs the public to anger, invites dispute, brings

19 As the Court noted in *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978):

> the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.

about a condition of unrest, or creates a disturbance." 337 U.S. at 4.[20]

Both the majority and the principal dissent in *Spence v. State of Washington*, 418 U.S. 405, agreed that punishing flag misuse because of its communicative impact on others is invalid. The majority flatly rejected the State's justification that it "desired to protect the sensibilities of passersby." 418 U.S. at 412; *see also id.* at 415-16 (Douglas, J., concurring). And even those who voted in dissent to uphold the Washington statute did so because in their view the statute's "operation does not depend upon whether the flag is used for communicative or noncommunicative purposes . . . or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message." *Id.* at 422-23 (Rehnquist, J., dissenting). Here, the statute's operation depends precisely upon whether the communicative purpose and effect of the act will be to seriously offend a "segment of the State's citizenry," and thus § 42.09(a)(3) fails scrutiny under both the majority and the dissenting analysis in *Spence*.[21]

20 *Accord, Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) ("mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms"); *Bachellar v. Maryland*, 397 U.S. 564 (1970) (unanimously reversing conviction for demonstration protesting Vietnam War where disorderly conduct statute permitted conviction for "the doing or saying or both of that which offends, disturbs or tends to incite a number of people gathered in the same area"); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (holding facially unconstitutional "breach of peace" statute that defined breach of peace as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet"); *cf. Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876, 882 (1988) ("an 'outrageousness' standard . . . runs afoul of our long-standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience").

21 Chief Justice Rehnquist and Justice White expressed the same concern in *Smith v. Goguen*, 415 U.S. 566 (1974), in which the majority invalidated a Massachusetts flag desecration statute as impermissibly vague. Justice White concurred on the ground that the statute made

2. The State's Interests Do Not Justify § 42.09(a)(3)'s Content-Based Infringement On Free Expression

Because § 42.09(a)(3) on its face draws impermissible content-based lines, the State must demonstrate that it is "necessary to serve a compelling state interest and [ ] is narrowly drawn to achieve that end." *Boos v. Barry*, 108 S. Ct. at 1164; *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722, 1728 (1987).[22] Texas asserts two state interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. Pet. Br. 19-30, 31-37. As the Texas Court of Criminal Appeals correctly held, neither can justify § 42.09(a)(3).

a. Preserving The Flag As A Symbol of National Unity Is An Impermissible Justification For A Restriction On Expression

Texas's principal justification for § 42.09(a)(3)—to preserve the flag as a "symbol of nationhood and national unity"—is not a compelling state interest. Indeed, it is precisely this interest in "prescribing what shall be orthodox" that renders the statute impermissibly viewpoint-based in the first place. *See* Section II.A, *supra*.

The Court has held that a state interest in preserving "respect for our national symbol" is insufficient to justify punishing contemptuous *words* directed at the flag. *Street*, 394 U.S. at 593. Because § 42.09(a)(3) is directed at communicative impact and therefore must be scrutinized under the same standard as a proscription on "pure" speech, this rationale must be rejected here as well.[23] It is inimical to First Amendment principles to claim that in order to preserve a symbol of "national unity," the government must be permitted to suppress citizens' use of that symbol to express dissent. Commitment to a symbol cannot justify political repression.

Moreover, even if the interest in preserving the flag as a symbol of national unity were a compelling state interest, Texas has made no showing that this interest is actually endangered by flagburning. People choose to burn the flag to express dissent precisely because it is such a powerful symbol. And because the flag is "not merely cloth dyed red, white, and blue," *Smith v. Goguen*, 415 U.S. at 603 (Rehnquist, J., dissenting), the burning of one or more physical representations of it cannot obliterate its metaphorical value as a symbol. There is simply no showing that flagburning threatens the flag's symbolic meaning. "[U]ndifferentiated fear . . . is not enough to overcome

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"the communicative aspect of the proscribed conduct . . . a crucial element of the violation," and inflicted "punish[ment] for communicating ideas about the flag unacceptable to the controlling majority in the legislature." 415 U.S. at 588 and n.3. Section 42.09(a)(3) goes even further, for it punishes action if it communicates ideas unacceptable not just to the "controlling majority," but to *any* onlooker or discoverer of the action.

Chief Justice Rehnquist, in dissent, agreed in principle with Justice White's approach:

> the question remains whether the State has sought only to punish those who impair the flag's physical integrity for the purpose of disparaging it as a symbol, while permitting impairment of its physical integrity by those who do not seek to disparage it as a symbol. *If that were the case . . . such a law would abridge the right of free expression.*"

Id. at 597-98 (Rehnquist, J., dissenting) (emphasis added).

22 If the Court finds the statute viewpoint-based, vague or overbroad, it need not address the State's interests at all, for no compelling state interest justifies such statutes. *See, e.g., Taxpayers for Vincent*, 466 U.S. at 804; *City of Houston v. Hill*, 107 S. Ct. 2502 (1987); *Kolender v. Lawson*, 461 U.S. 352 (1983).

23 *See* Section I *supra*. Professor Nimmer's general critique of flag desecration statutes is particularly applicable to § 42.09(a)(3), given its explicit reliance on communicative impact:

> The Court in *Street* expressly held that 'respect for our national symbol' is not an interest which may be protected against *words* that deprecate such respect. If the only governmental interest at stake is the prohibition of communications that deprecate respect for the flag, then it can make no difference that the message of deprecation is expressed by symbolic acts rather than words. In either event the governmental interest is not, in the *O'Brien* phrase, an 'interest unrelated to the supression of free expression,' and hence must succumb to the First Amendment.

Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. at 57 (original emphasis).

the right to freedom of expression." *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. 503, 508 (1969).[24]

Thus, the Texas Court of Criminal Appeals correctly held that the State may not suppress the expression of flagburning in the interest of preserving a symbol of national unity. (Pet. App. 18- 21); *see also Kime*, 459 U.S. at 952-53 (Brennan, J., dissenting from denial of certiorari); *Monroe v. State Court of Fulton County*, 739 F.2d at 574-75.

b. Section 42.09(a)(3) Is Not Narrowly Tailored To The State's Asserted Interest In Preventing Breaches Of The Peace

Texas's second asserted state interest is in preventing breaches of the peace. Pet. Br. 31. But the Texas Court of Criminal Appeals has authoritatively construed § 42.09(a)(3) to extend far beyond acts likely to incite breaches of the peace:

> Section 42.09(a)(3) is so broad that it may be used to punish protected conduct which has no propensity to result in breaches of the peace. 'Serious offense' does not always result in a breach of the peace. . . . One cannot equate 'serious offense' with incitement to breach the peace.

(Pet. App. 13). This interpretation by Texas's highest court for criminal appeals of a Texas criminal statute is binding on this

24 Because § 42.09(a)(3) is facially directed not at preserving the flag's symbolic meaning but at "seriously offend[ing]" onlookers, the statute is both underinclusive and overinclusive with respect to this asserted state interest. The statute does not prohibit all flag "mistreatment," no matter how much it might threaten the flag's symbolic value, but only those acts that "will seriously offend" onlookers. And conversely, the statute proscribes all acts of flag "mistreatment" that "will seriously offend" onlookers, whether or not they threaten the flag's symbolic value.

Texas's suggestion that the proscription of flag desecration is necessary to ensure that the flag remains a usable symbol for all ideas, Pet. Br. 28-30, is both disingenuous and unsupported by the record. Texas's brief makes absolutely clear that its interest is not in protecting all ideas, but in protecting the specific idea that the flag is a "symbol of nationhood and national unity." Pet. Br. 19, 20-24.

Court. *See, e.g., Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 626 (1875). In light of that construction, the Court cannot find that § 42.09(a)(3) is narrowly tailored to prevent breaches of the peace. This Court has repeatedly struck down similarly broad statutes allegedly directed at preventing breaches of the peace. *Cohen v. California*, 403 U.S. 15 (1971); *Bachellar*, 397 U.S. at 566-67; *Terminiello*, 337 U.S. at 4.[25]

The Texas Court of Criminal Appeals also noted that Texas has another statute directly addressed to words and conduct that tend to incite an immediate breach of the peace, Tex. Penal Code Ann. § 42.01.[26] As this Court stated in *Boos v. Barry*, the existence of another statute more narrowly tailored to the asserted state interest supports the conclusion that the challenged statute is not narrowly tailored and cannot withstand First Amendment scrutiny. 108 S. Ct. at 1166-67.

25 Texas argues that the Texas Court of Criminal Appeals held it to too strict a standard "[b]y requiring *actual* as opposed to potential violence before a prosecution for desecration of the flag may be initiated." Pet. Br. 36. This grossly misstates the Court of Criminal Appeals' analysis. The court merely noted the absence of any breach of the peace in this case as evidence disproving the claim that flag desecration will *inherently* cause a breach of the peace. Pet. App. 13. Indeed, the fact that there have been many cases of flag misuse and desecration without a breach of the peace conclusively defeats a claim that the act will inevitably or "inherently" cause a breach of peace. *See, e.g., Spence*, 418 U.S. at 409; *Street*, 394 U.S. at 592; *Monroe v. State Court of Fulton County*, 739 F.2d at 575; *Jones v. Wade*, 479 F.2d 1176, 1180 (5th Cir. 1973).

The Court has consistently rejected bare claims that particular expressive conduct is "inherently" likely to cause disruption, and has insisted on an evidentiary showing that the fear is well founded. *See Cohen v. California*, 403 U.S. at 22 (rejecting as "plainly untenable" the claim that the word "Fuck" could be proscribed on the theory that "its use is inherently likely to cause violent reaction"); *Tinker*, 393 U.S. at 508.

26 *See* note 9 *supra*. In striking down a Houston ordinance as unconstitutionally overbroad, this Court pointed to Tex. Penal Code Ann. § 42.01, noting that it is "designed to track the 'fighting words' exception set forth in *Chaplinsky v. New Hampshire*." *City of Houston v. Hill*, 107 S. Ct. at 2510 n.10.

C. Section 42.09(a)(3) Is Unconstitutionally Vague And Overbroad

Whether or not Texas may constitutionally place viewpoint- and content-based restrictions upon the use and display of private person's flags, it certainly may not do so in the hopelessly vague and overbroad terms that this statute uses. The Court has held that statutes impinging upon areas protected by the First Amendment must be drawn with narrowness and precision. *See, e.g., City of Houston v. Hill*, 107 S. Ct. at 2508; *Kolender v. Lawson*, 461 U.S. 352; *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Section 42.09(a)(3) fails on both counts.

1. Section 42.09(a)(3) Is Impermissibly Vague

Section 42.09(a)(3) fails to draw a comprehensible line between those acts of flagburning it prohibits and those it permits, and is therefore unconstitutionally vague on its face.[27] *Smith v. Goguen*, 415 U.S. at 574. The statute proscribes only those acts of flagburning or misuse which "the actor knows will seriously offend one or more persons likely to observe or discover his action." This renders § 42.09(a)(3) perfectly vague, because what will "seriously offend" another is as unknowable as what will "annoy" another. *Coates v. Cincinnati*, 402 U.S. 611.

A statute is impermissibly vague if it " 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " *Goguen*, 415 U.S. at 572 n.8 (*quoting Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)). The vagueness doctrine applies with special force in the First Amendment context. *Goguen*, 415 U.S. at 572-73;

27 Mr. Johnson maintains that because of the inherent subjectiveness of the standard punishing only those actions which will "seriously offend one or more persons likely to observe or discover [the] action," the statute is vague on its face, *i.e.*, "every application [ ] create[s] an impermissible risk of suppression of ideas." *New York State Club Assn. v. City of New York*, 108 S. Ct. 2225, 2233 (1988). If Mr. Johnson is correct on his facial claim, the statute is by definition vague as applied to him as well.

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

Section 42.09(a)(3) is vague in several significant respects. First, it requires an individual to predict the reactions of unknown and unknowable third parties. He must foresee what will "seriously offend" not merely all potential passers-by, but also all who might "discover" his action later through word of mouth, the news media, or a photograph. In *Coates*, this Court held that a law that turns on the reactions of onlookers is inherently vague. *Coates*, 402 U.S. at 611-14 (ordinance proscribing "conduct in a manner annoying to persons passing by" is perfectly vague, because "no standard of conduct is specified at all"). Section 42.09(a)(3)'s focus on "serious offense" to others is at least as standardless as the ordinance struck down in *Coates*.

Second, the statute draws an unintelligible distinction between actions which will merely offend the unidentifiable third parties, which are permissible, and actions which will "seriously offend" them, which are criminal. The trial in this matter illustrates the impossibility of distinguishing permissible offense from punishable "serious" offense. Virtually all the witnesses at trial testified that the flagburning "offended" them, but only two police officers, sent by the State to observe the demonstration, said that it "seriously offended" them. (R.II-91, III-220).[28] The legal observers at the demonstration testified that the action offended them, but not seriously, because they believed that everyone has a right to express themselves by using the flag in the way they deem appropriate. (R.III-330-32, IV-483-84). Thus, in this case it appears that in order to determine whether flagburning would have seriously offended an onlooker, one would have had to ascertain of those who might be offended whether they valued more highly unmitigated respect for the flag as a symbol of national unity, or the principle of free expression.

28 The fact that the only persons who were actually "seriously offended" were state agents underscores the extent to which this statute operates to promote the State's viewpoint.

In *Goguen*, the Court held impermissibly vague a statute that prohibited "contemptuous" treatment of the flag, because " '[w]hat is contemptuous to one man may be a work of art to another.' " *Id.* at 573 (*quoting* Note, *Freedom of Speech—Desecration of National Symbols As Protected Political Expression*, 66 Mich. L. Rev. 1040, 1056 (1968)). The same rationale requires invalidation of § 42.09(a)(3), because what "seriously offend[s]" one person may be an important statement of political expression to another. Like the "outrageousness" standard this Court unanimously struck down last term in *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. at 882, a "seriously offend" standard permits biased enforcement, because it "has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[29]

This Court has recognized that the American flag holds radically different meanings for different people: "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Barnette*, 319 U.S. at 632-33. Whether one is "seriously offended" by the burning of our flag, then, is likely to turn on the flag's particular meaning for that person, and will often turn on one's view of the United States, or one's political assessment of the country's policies at a given time.[30]

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29 The statute is not saved by the fact that it includes a requirement that the individual "know" his conduct "will seriously offend" others. The Court rejected precisely that argument in *Goguen*, noting that restricting the scope of the statute to "intentional contempt" for the flag "does not clarify what conduct constitutes contempt, whether intentional or inadvertent." 415 U.S. at 580. Similarly, this statute does not, and indeed cannot, clarify what conduct "will seriously offend" others.

30 The "seriously offend" clause is so vague that burning the flag ceremoniously in order to dispose of it might even violate it, if a Jehovah's Witness or a vigorous opponent of U.S. policies were likely to observe or discover the act. A Jehovah's Witness might be seriously offend-

Third, the statute's prohibition of "physical mistreat[ment]" is also impermissibly vague. It provides no guidance as to what constitutes "mistreat[ment]" of the flag. A Boy Scout or war veteran will no doubt define "mistreat" very differently from a member of the Revolutionary Communist Youth Brigade. If one agrees with the State that the flag deserves deep respect because it symbolizes the nation, mistreatment would be any conduct that demonstrates a lack of respect. If one believes that the flag is not deserving of such respect, for religious or political reasons, any action that shows respect would constitute mistreatment. Indeed, a Republican might deem use of the flag as part of a Democratic campaign banner "mistreatment," and vice versa.[31]

Thus, as in *Goguen*, the Court need not decide whether the government may ever proscribe flagburning, but only that it is impermissible to define criminal conduct by such vague standards as whether unidentifiable third parties are likely to be "seriously offend[ed]," or whether the flag has been "physically mistreat[ed]."[32]

---

ed by such quasi-religious treatment accorded to a secular object. Critics of U.S. policies might also be "seriously offended" by ceremonious destruction of the flag, just as many people would be "seriously offended" by dignified treatment accorded a swastika, the national symbol of Nazi Germany. At various times in this country's history, Native Americans, Blacks, women denied the right to vote, religious persons forced to salute the flag, filmmakers blacklisted as Communists, citizens of Japanese ancestry detained during World War II, and others victimized by the United States government might well have considered any respectful treatment of the flag "seriously offen[sive]."

31 Even the term "national flag" is vague, for it does not indicate which nation's flags are covered, nor which representations of flags are covered. *See, e.g., Smith v. Goguen*, 415 U.S. at 758-79 and n.24.

32 Texas's suggestion that the "seriously offend" clause is severable and that this matter should be remanded to the Texas Court of Criminal Appeals to consider a "saving construction" is frivolous. As this Court held unanimously in *Bachellar v. Maryland*, 397 U.S. at 570, even when the unconstitutional portion of a statute is severable, if the verdict does not specify its limitation to the non-problematic section, the conviction must be reversed.

2. Section 42.09(a)(3) Is Substantially Overbroad

In addition to being void for vagueness, § 42.09(a)(3) is substantially overbroad. *City of Houston v. Hill*, 107 S. Ct. at 2508.[33] By penalizing all "mistreat[ment]" of the flag that "will seriously offend" another person, it prohibits a substantial amount of clearly protected First Amendment activity.

Section 42.09(a)(3) prohibits all "physical mistreat[ment]" of a flag which could conceivably seriously offend someone. If one took one's guidance concerning mistreatment from the rules for proper treatment of the flag set out in 36 U.S.C. §§ 174-77, Texas's statute would proscribe all of the following acts:

(1) displaying the flag in "inclement weather," or after sunset without "proper illuminat[ion]";

(2) hoisting the flag slowly rather than "briskly";

(3) *not* displaying the flag on "Mothers Day" or "Navy Day";

(4) flying a flag from any part of an automobile other than "the chassis" or "the right fender";

(5) displaying the flag at a level lower than the flag of the United Nations or any other national or international flag;

(6) displaying the flag to the right of a speaker;

(7) displaying the flag over the middle of an east-west street without placing the union to the north;

(8) allowing the flag to touch the ground;

(9) carrying the flag horizontally, rather than "aloft and free";

(10) wearing the flag;

33 The statute's vagueness greatly exacerbates its overbreadth, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 494 n.6, but Mr. Johnson contends that even if the Court finds the statutory terms clear they are overbroad.

(11) affixing a flag patch to the uniform of any organization other than a "patriotic organization";

(12) not standing at attention with the right hand over the heart whenever the flag passes in a parade.

See 36 U.S.C. § 174-77. Moreover, as noted above, virtually any conduct regarding the flag has the potential of "seriously offend(ing)" someone. Thus, § 42.09(a)(3) proscribes an almost infinite range of protected activity.

Section 42.09(a)(3)'s substantial overbreadth is further illustrated by comparing its broad prohibitions to the only two categories of expression which the Court permits the State to prohibit on the basis of its effect on others: speech that is intended and likely to produce imminent lawless action, and "fighting words." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Cohen v. California*, 403 U.S. at 20.

In *Brandenburg*, the Court narrowly limited the scope of speech which may be proscribed in order to prevent incitement of law violations to expression that is both "directed to inciting or producing imminent lawless action" *and* "likely to incite or produce such action." 395 U.S. at 447. Statutes that do not draw that narrow line, like § 42.09(a)(3), are facially unconstitutional. *Id.*

Nor is Texas's statute directed to prohibit "fighting words." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The Court's decision in *Street* compels this conclusion, for that case held that the statement "we don't need no damn flag," made *while* burning an American flag, was not so "inherently inflammatory" as to come within the class of "fighting words." *Street*, 394 U.S. at 592; *see also Cohen v. California*, 403 U.S. at 20-21 ("fighting words" doctrine applies only where speech is directed at a particular individual and is so "personally abusive" that it is "inherently likely to provoke violent reaction"); *City of Houston v. Hill*, 107 S. Ct. at 2510 (same).

Thus, § 42.09(a)(3) is substantially overbroad for much the same reason that it is impermissibly vague: it seeks to punish

expression that "seriously offends" others, and this Court has held that such speech is protected.

III. SECTION 42.09(a)(3) IS UNCONSTITUTIONAL AS APPLIED TO THE FLAGBURNING AT ISSUE IN THIS CASE

If the Court concludes that § 42.09(a)(3) is not unconstitutional on its face, it should nonetheless uphold the Texas Court of Criminal Appeals' decision that the statute is unconstitutional as applied in this case. This conclusion is required because: (1) the peaceful burning of a flag at the culmination of a political demonstration is protected symbolic speech; and (2) Mr. Johnson may have been convicted for his words and affiliations.

A. The Flagburning At Issue In This Case Was Symbolic Speech

Every judge to address whether the flagburning in this case was symbolic speech has concluded that it was, including even those who voted to uphold Mr. Johnson's conviction. *See* Pet. App. 8-10 (Texas Court of Criminal Appeals majority opinion); Pet. App. 25 (dissenting opinion); *Johnson v. State*, 706 S.W.2d at 123 (opinion of then-Judge Vance). According to then-Judge Vance, the State itself did not dispute that Mr. Johnson's conduct was symbolic speech at the Dallas County appeal level. 706 S.W.2d at 123.

The State now *asserts* that Mr. Johnson's alleged activity was not symbolic speech, but fails to offer any rationale to support is assertion.[34] Instead, the State argues that the statute satisfies

34 Texas does assert, in its summary of argument, that "an act of flagburning does not constitute 'speech' entitled to First Amendment protection because the conduct involved is essential neither to the exposition of any idea nor to the peaceful expression of an opinion." Pet. Br. at 9. But it never pursues this line of argument, nor suggests where it finds support in First Amendment precedent or principle. Neither the wearing of armbands in *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. 503, nor the affixing of a peace sign to a flag in *Spence v. Washington*, 418 U.S. 405, nor the display of a flag in *Stromberg v. California*, 283 U.S. 359 (1931), were found to be "essential" to express the idea or opinion they expressed, yet all were deemed protected symbolic speech. To suggest that the State may proscribe all forms of expression not deemed "essential to the exposition of any idea" is contrary to the entire history of the First Amendment. It is "the usual rule that governmental bodies may not prescribe the *form* or content of individual expression." *Cohen v. California*, 403 U.S. at 24 (emphasis added).

the test for regulation of symbolic speech set out in *United States v. O'Brien*. Pet. Br. 10-11. Amici similarly do not offer any rationale for concluding that Mr. Johnson's alleged conduct did not constitute symbolic speech, and instead argue that the state's regulation was directed at the flagburning's conduct element, not the speech element. Amici Br. of Washington Legal Foundation 3-5. But as commentators have unanimously noted, the distinction between the conduct element and the speech element of expressive conduct is a futile one.[35]

The test this Court has adopted does not attempt to distinguish between speech and conduct *per se*, but simply asks whether, in context, the conduct involved was communicative in intent and effect. *Spence*, 418 U.S. at 410-11. Where there is "[a]n intent to convey a particularized message . . . and the likelihood was great that the message would be understood by those who viewed it," the conduct is symbolic speech. *Id.* The flagburning in this case came at the culmination of an overtly political demonstration, in the midst of the Republican National Convention, in front of Dallas City Hall, as demon-

35 *See* Ely, *Flag Desecration*, 88 Harv. L. Rev. at 1494-96; L. Tribe, *American Constitutional Law* 827 (2d ed. 1988); Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 Harv. L. Rev. 63, 79-80 (1968); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. at 33 ("Any attempt to disentangle 'speech' from conduct which is itself communicative will not withstand analysis. The speech element in symbolic speech is entitled to no lesser (and also no greater) degree of protection than that accorded to so-called pure speech.").

strators chanted political slogans condemning the United States. The Texas Court of Criminal Appeals correctly decided that in "the context of an organized demonstration, speeches, slogans, and the distribution of literature," the flagburning was intended and understood as an act of symbolic expression. (Pet. App. 8-10).

Because the flag carries such a powerful symbolic meaning, almost any conduct with regard to it is communicative:

> [W]hen the object is a pure symbol, such as the flag . . . any individualized activity with regard to it outside of the purely logistical activity of maintaining it or storing of it is bound to convey a message of fealty or revulsion and 'is closely akin to pure speech.'

Goguen v. Smith, 471 F.2d 88, 99 (1st Cir. 1972), *aff'd*, 415 U.S. 566 (1974).[36] Moreover, precisely because its message is nonverbal, the symbolism of flagburning cuts across language barriers to reach the international community abroad, the foreign-language speaking community here, and even the illiterate. In the age of broadcast media, sound bites, and instantly-transmitted television images, flagburning, no less than the sit-ins of the civil rights movement, provides a powerful medium for the message of dissent from government policies or disrespect for the government itself.[37] For these reasons, this Court has frequently recognized that the absence of words in no way diminishes the First Amendment protection accorded to political expression. *See, e.g., Tinker v. Des Moines School District*, 393 U.S. 503 (wearing of black armbands to protest

36 *See also* M. Talocci, *Guide to the Flags of the World* 7-8 (rev. ed. 1977) ("the more the symbolism of flags and the way they are put to use are studied, the clearer it becomes that they are in fact a system of communication . . . a flag is a statement made in nonverbal terms which—if read properly—can tell us a great deal about the bearer.")

37 The important symbolism of flag misuse and burning is demonstrated by the flag cases themselves. Mr. Spense hung his flag to protest the invasion of Cambodia and the killing of students at Kent State, Mr. Street burned the flag in response to the shooting of civil rights worker James Meredith, and Ms. Monroe did so to express opposition to the United States' support of the Shah of Iran.

Vietnam War); *Brown v. Louisiana*, 383 U.S. 131 (1966) (sit-in to protest segregation); *Stromberg v. California*, 283 U.S. 359 (flying of red flag to symbolize opposition to organized government).

Once conduct is determined to be symbolic expression, the Court must determine whether "the governmental interest [in regulating it] is unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377. As we have shown above, where the government's interest is related to the suppression of free expression, as it is here, the *O'Brien* analysis is inapplicable, and traditional strict First Amendment scrutiny is mandated. *See* Section I, *supra*. Under such scrutiny, Texas has failed to advance any compelling state interest sufficient to justify the infringement of Mr. Johnson's protected expression. *See* Section II.B.2, *supra*.

B. Mr. Johnson May Have Been Convicted For His Speech And Affiliations

As in *Street*, this case poses the real possibility that Mr. Johnson was punished, not for flagburning, but for his words and associations. *Street*, 394 U.S. 576. The Court in *Street*, after undertaking the independent examination of the record required in all cases raising the possibility of punishment for First Amendment activity, 394 U.S. at 589, concluded that the jury might have relied in part upon Mr. Street's words while burning the flag to convict him, and therefore reversed the conviction. 394 U.S. at 590.

In this case, the jury was instructed, over defense counsel's objection, that it could convict Mr. Johnson if it concluded *either* that he burned the flag himself, or that he "encouraged" the flagburning. (R.I-49). No First Amendment limiting instruction was given. The prosecution's closing is replete with references to protected speech and associations, and expressly relied on the "encouragement" theory for a finding of guilt:

> if you look at this evidence from start to finish, the participating in the beginning, the literature, the last notations [R.C.Y.B.], the shirt, who he is, the chanting, the yelling,

> the megaphone, the encouragement, the having the [mega]phone, being there, wanting this to happen, there is no question he encouraged it at all. He's guilty as sin as far as the law of parties is concerned.

(R.V-707-08). In addition, the prosecutor focused repeatedly on Mr. Johnson's affiliation with the Revolutionary Communist Youth Brigade and on the fact that while the flag burned, the group chanted "Red, white, and blue, we spit on you." *See* Statement of Facts, *supra*.

While § 42.09(a)(3) on its face does not include punishment for mere words, unlike the statute in *Street*, its proscription does turn on "serious offense," which may arise at least in part from the words spoken while the act is being committed, and certainly arose in this case precisely because of the message conveyed. *See* note 4 *supra*. Moreover, when the statute is read together with the "law of parties" jury instruction and the prosecutor's focus at trial and in closing argument on Mr. Johnson's chanting, speechmaking, and affiliations, the possibility that he was convicted for his words and associations cannot be discounted.[38] Accordingly, as in *Street*, the conviction must be overturned.

38 This possibility is underscored by the fact that in its deliberations the jury specifically requested to review "testimony regarding the defendant's use of the megaphone." (R.I-53).

CONCLUSION

For all the above reasons, the decision of the Texas Court of Criminal Appeals should be affirmed.[39]

Respectfully submitted,

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39 If the Court reverses, it should remand to the Texas Court of Criminal Appeals for determination of Mr. Johnson's remaining challenges to the conviction.

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No. 88-155

In The

Supreme Court of the United States

October Term, 1988

THE STATE OF TEXAS,

Petitioner,

vs.

GREGORY LEE JOHNSON,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

COMES NOW THE STATE OF TEXAS, Petitioner, and respectfully submits this brief in reply to the brief of Respondent, Gregory Lee Johnson.

I. SECTION 42.09(a)(3) DOES NOT PROHIBIT CONDUCT ON THE BASIS OF COMMUNICATIVE IMPACT

The primary thrust of Respondent's argument is that § 42.09(a)(3) "singles out for prohibition only such conduct as will have a 'seriously offen[sive]' communicative

impact on others."[1] Resp. Br. 10. Johnson argues that "[b]ecause the flag carries such a powerful symbolic meaning, almost any conduct with regard to it is communicative." Resp. Br. 32. Johnson also claims that "flagburning . . . provides a powerful medium for the message of dissent from government policies or disrespect for the government itself." *Id.* These arguments assume that an individual who abuses a flag is always "saying something" by virtue of that abuse. The arguments also assume not only that all acts of flagburning are disrespectful and constitute a means of dissent, but that the disrespect/dissent is directed at the government itself, and not at some other entity.[2] These assumptions have no basis in fact.

Johnson's arguments also constitute a gross mischaracterization of the statute. The focus of the Texas statute is on a particular act and the accompanying *mens rea*. The statute is essentially designed to protect the physical integrity of the flag. The Texas statute does not single out conduct that expresses an anti-government

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[1] Johnson's argument that one must "foresee what will 'seriously offend' not merely all potential passers-by, but also all who might 'discover' his action later through word of mouth, the news media, or a photograph," Resp. Br. 25, completely misconstrues the statute, which clearly relates only to actual discovery as opposed to reported discovery.

[2] This is an interesting argument in view of the fact that Johnson's own trial exhibits were directed largely at the policies of certain American corporations and not at the "government" per se. (R.V-833; Def. Ex. 1).

message. Section 42.09 does not regulate the content of the message, if any, sought to be conveyed; rather, the statute regulates conduct and the manner in which the conduct is effectuated. *See* Pet. Br. 44.

In this regard, the crime does not turn on the reaction, if any, of those who view an act of flag desecration, but on an intentional act of severe, flagrant physical abuse of the flag. The statute, by its terms, is not concerned with any expression which may accompany the act of flag desecration. Thus, the State's proscription is not limited to those acts of desecration which communicate unacceptable ideas about the flag. The statute does not punish only those who desecrate the flag "for the purpose of disparaging it as a symbol," but also those who would *not* necessarily desecrate the flag with that motive or purpose. *See Smith v. Goguen*, 415 U.S. 566,598-599 (1974) (Rehnquist, J., dissenting).

The First Amendment was never intended to extend to physical acts of destruction involving the American flag. The fact that an individual may intend an act of flag desecration to convey a message, even a particularized message, is insufficient to cloak the act with First Amendment protection. An individual "leaves the arena of speech" and crosses the line into unprotected conduct when he engages in an act of wanton destruction.

Moreover, the statute can be read so that the "serious offense" language is applicable only to that portion of the definition of desecrate which modifies the term "physically mistreat." Indeed, the very placement of the commas may well indicate that the legislature intended that the terms "deface" and "damage" stand alone without any

further clarification. Read in this way, the "serious offense" language becomes pertinent only in a marginal case where it is questionable whether an act of physical mistreatment of the flag is serious enough to constitute desecration.

The Texas Court of Criminal Appeals did not specifically interpret the meaning of the definition of "desecrate," nor did it decide the relationship of the definition to the remainder of the statute. More importantly, the court did *not* find that the language rendered the statute "essentially communicative" or proscribed penalties for expressive impact alone. The court held only that the language was too broad to justify the statute as a breach of the peace statute.[3]

In the alternative, if this Court deems that § 42.09(a)(3) does regulate expressive conduct or conduct with communicative impact, the State has nonetheless elaborated two compelling interests that justify regulating that conduct. These interests – preserving the flag as a symbol of nationhood and national unity *and* preventing a breach of the peace – have been discussed in depth

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[3] The Court of Criminal Appeals found this clause overbroad only as a breach of the peace statute, reasoning that serious offense would not always result in a breach of the peace. Pet. App. 13. Even if this erroneous legal conclusion is binding upon this Court, it does not void the statute. The Texas court did not address the overbreadth question vis-a-vis the nationhood and national unity interest, nor did it address overbreadth in the context of the First Amendment. The Court of Criminal Appeals found only that the statute could not be applied to Johnson as a breach of the peace statute since no actual violence occurred. *Id.*

in the State's brief on the merits. Pet. Br. 19-37. Those interests and the State's discussion of those interests have been all but ignored by Respondent. Texas' interests are sufficient to justify whatever minimal infringement of speech may ensue from enforcement of the statute.

II. SECTION 42.09(a)(3) IS "VIEWPOINT NEUTRAL"

Johnson claims that the statute is "viewpoint based," in that it "favors the State's viewpoint that the flag is a 'symbol of nationhood and national unity' at the expense of all other views." Resp. Br. 13. Johnson states that "[t]hose who seek to celebrate the viewpoint sanctioned by the State, however, may burn the flag, so long as they do so ceremoniously." *Id.* This is simply not the case.

Section 42.09(a)(3) does not permit impairment of the flag's physical integrity by those who do not seek to disparage it as a symbol or by those who seek to "praise" the flag or this country. Texas prohibits flagburning *regardless* of the message, if any, sought to be conveyed by the conduct. A flagburning is a flagburning; a flagburning as a "contra memorial" is as illegal as a "contra protest." *Cf. Amici* Br. ACLU 14-15. A flagburning to "demonstrate respect for the symbol," Resp. Br. 14, does not decriminalize the conduct.

In propounding his claim that Texas would allow a flag to be destroyed to show patriotism or to make some affirmation of faith to the nation, Johnson refers to 36 U.S.C. § 176(K). While that statute does provide that the "proper" way to dispose of a flag is to burn it in a dignified way, this refers only to the retirement from

service of a flag too worn to be displayed, not to the act of burning a flag to proclaim a patriotic stance.

For many, the flag may be the ultimate symbol of patriotism. For others, it may symbolize a nation unresponsive or even oppressive. Still others may view the flag with no discernable emotion at all. Texas regulates none of these viewpoints. Texas only commands all within its borders and subject to its jurisdiction to refrain from desecrating the flag.[4] The statute demands only that the flag be left alone, physically unimpaired.[5]

III. SECTION 42.09(a)(3) IS NOT UNCONSTITUTIONALLY VAGUE

In his brief, Johnson has reiterated the vagueness challenges raised in the Texas courts. He claims that the statute is vague because it "fails to draw a comprehensible line between those acts of flagburning it prohibits and those it permits." Resp. Br. 24. Johnson's argument focuses primarily on § 42.09(b) which defines "desecrate" as meaning, in part, to "physically mistreat" in a way that the actor knows will "seriously offend" one or more

[4] Texas agrees that the United States flag is "sui generis." *Parker v. Morgan*, 322 F.Supp. 585,588 (W.D.N.C. 1971); *Amici* Br. for W.L.F. 11. The flag is "of its own kind or class." *Black's Law Dictionary* 1602 (4th ed. 1968). It is unique, a special entity whose ownership carries with it special responsibilities.

[5] The applicability of § 42.09 to the desecration of other objects should help clarify this fact. The statute does not permit "ceremonial" damage to a tombstone or "dignified" defacement of the Alamo.

persons likely to observe or discover his action. Assuming, without conceding, that Johnson is entitled to present this argument,[6] § 42.09(a)(3) is not unconstitutionally vague.

Recently, in *New York State Club Ass'n. v. City of New York*, ___ U.S. ___, 108 S.Ct. 2225, 2233 (1988), this Court reiterated the general rule that a facial challenge is proper under the First Amendment only when the challenged law could *never* be applied in a valid manner or when, even though a law may be validly applied to defendant, it is so broad that it may inhibit the constitutionally protected free speech of third parties:

> Properly understood, the latter kind of facial challenge is an exception to ordinary standing requirements, and is justified only by the recognition that free expression may be inhibited almost as easily by the potential or threatened use of power as by the actual exercise of that power. Both exceptions, however, are narrow ones: the first kind of facial challenge will not succeed unless the court finds that "every application of the statute created an impermissible risk of suppression of ideas," and the second kind of facial challenge will not succeed unless the statute is "substantially" overbroad, which requires the court to find "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court."

[6] The intermediate court of appeals found nothing vague about the terms of the statute. J.A. 20. The Court of Criminal Appeals, which had granted Johnson's petition for discretionary review on this point, specifically declined to address this issue. Pet. App. 2,4,21. This argument, if successful, would substantially alter the judgment by determining that the statute is unconstitutional on its face. This issue should have been raised, if at all, in a cross-petition for certiorari.

(Citations omitted). *See also City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789,797-798 (1984), citing *Thornhill v. Alabama*, 310 U.S. 88 (1940). In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. A court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, uphold the challenge only if the enactment is impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489,494-495 (1982).

Under Texas law, a statute is not rendered vague merely because the words or terms used are not defined. Even a statute which appears vague may be given constitutional clarity when aided by standard rules of statutory construction. One such rule is that terms not defined in a statute are given their ordinary meaning. TEX. GOV'T CODE ANN. § 312.002 (Vernon 1988). Words defined in dictionaries and with meanings so well known as to be understood by a person of ordinary intelligence are not considered vague or indefinite. *Floyd v. State*, 575 S.W.2d 21,23 (Tex. Crim. App. 1978).

Johnson first attacks the term "physically mistreat" as vague. Surely, the word "physically" is understandable. *See Webster's New Collegiate Dictionary* 859 (1980) which defines "physical" as "having material existence." "Mistreat," too, is readily capable of definition. *See Webster's New Collegiate Dictionary* 730 (1980) which defines

"mistreat" as "to treat badly: abuse."[7] There is no question in this case but that Johnson "abused" the "material existence" of the flag by burning it.

The term "seriously offend" is also readily understandable. "Seriously" has been defined as "to a serious extent; severely." *Webster's New Collegiate Dictionary* 1051 (1980). "Serious" is defined, in relevant part, as "deeply interested" and "having important or dangerous possible consequences." *Id.* at 1050. "Offend" is defined, in part, as "to cause dislike, anger, or vexation," "to cause to feel vexation or resentment usu[ally] by violation of what is proper or fitting." *Id.* at 790. Thus, an individual is guilty under this portion of the statute if he "abuses" the "material existence" of the flag in a way that he knows might produce a reaction of resentment or anger with possible dangerous consequences.

A fair reading of § 42.09(a)(3) reveals that the Texas statute regulates conduct which significantly impairs the physical integrity of the flag and no more. A reasonable person of common intelligence is placed on sufficient

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[7] The terms "deface" and "damage," which are also part of the statutory definition of desecrate, are also well-defined terms. *See Webster's New Collegiate Dictionary* 293 (1980) ("deface" is defined as "to mar the external appearance . . . injure by effacing significant details") and 284 ("damage" is defined in part as "loss or harm resulting from injury to . . . property"). A flag is unquestionably damaged when burned. Johnson was specifically charged by information with damaging *and* physically mistreating the flag by burning it. I.A. 3. The jury had to specifically find that burning the flag constituted "damage" *or* "physical mistreatment" in order to return a conviction. (R.I-50).

notice of what the statute forbids. Certainly any individual of common intelligence would have no difficulty in discerning that the act of soaking an American flag with lighter fluid and igniting it constitutes desecration.

Contrary to Johnson's assertions, application of the statute does not depend upon or vary with the sensibilities of persons likely to observe the conduct. The definition of "desecrate" modifies the culpable mental state. The statute does not proscribe reckless or negligent handling of the flag, only intentional and knowing abuse – the kind of mistreatment that the actor knows is not innocent but is intentional and designed to seriously offend. A relatively casual touching or mishandling of the flag, such as wadding it up and tucking it under a tee shirt, which might "offend" the sensibilities of some persons, is not within the reach of this statute. Instead, Section 42.09 punishes only conduct which constitutes severe physical abuse of the flag which an individual knows is likely to seriously offend potential observers. The statute is invoked only when an individual commits flagrant abuse of the flag.

Section 42.09(a) (3) differs significantly from the statute condemned in *Coates v. Cincinnati*, 402 U.S. 611 (1971). At issue in *Coates* was a municipal ordinance making it a criminal offense for three or more persons to assemble on any sidewalk and there conduct themselves in a manner annoying to persons passing by. *Id.* at 612 n. 1. This Court found that the statute was vague[8] because "no standard

[8] The dissent by Justice White found the statute was not vague as "[a]ny man of average comprehension should know that some kinds of conduct, such as assault or blocking passage on the street, will annoy others and are clearly covered by the 'annoying conduct' standard of the ordinance." 402 U.S. at 618.

of conduct is specified at all." *Id.* at 614. Section 42.09 is quite different from the ordinance in *Coates*. Section 42.09(a)(3) clearly specifies the offensive conduct contemplated by use of the term "desecrate" – deface, damage or physically mistreat. This is a definite standard of conduct. Individuals of common intelligence need not guess at the meaning of this statute.

Smith v. Goguen, 415 U.S. 566 (1974), is also distinguishable. That case involved a Massachusetts flag misuse statute which made it an offense to "treat contemptuously"[9] the United States flag. *Id.* at 570,571. A majority of this Court concluded that this language was impermissibly vague[10] on its face, holding that it supplied

[9] *Treating* a flag "contemptuously" is different from *physically mistreating* a flag in a way that the actor knows will seriously offend others. "Contemptuously," by its very nature, means "manifesting, feeling, or expressing contempt," which is defined as "lack of respect or reverence for something." *Webster's New Collegiate Dictionary* 242-243 (1980). "Treats contemptuously" is thus an act which, by its very nature, must express a lack of respect. *See Goguen*, 415 U.S. at 588 (White, J., concurring).

[10] Justice White, concurring in the judgment, found that the statute was not vague, but was, in fact, capable of understanding by "anyone with at least a semblance of common sense." 415 U.S. at 584. Justice White also found that the statute was not vague as to Goguen because he was "under no misapprehension as to what he was doing" and because "[i]t should not be beyond the reasonable comprehension of anyone who would conform his conduct to the law to realize that sewing a flag on the seat of his pants is contemptuous of the flag." *Id.* at 584-585. Those justices who dissented agreed that the statute was not vague. *Id.* at 590 (Blackmun, J., dissenting). *Id.* at 591 (Rehnquist, dissenting). Both dissents were joined by then Chief Justice Burger.

no standard. This Court reasoned that the statute, which had received no narrowing state court interpretation, failed to draw reasonably clear lines between the kinds of nonceremonial treatment of the flag that it criminalized and those that it did not.[11] *Id.* at 574.

Unlike *Goguen*, the Texas statute establishes a definite standard of conduct. Section 42.09(a)(3) clearly defines what type of conduct constitutes desecration, *i.e.*, defacement, damage or physical mistreatment. If the complained-of "serious offense" language modifies the entire definition, it goes to the culpable mental state of the individual at the time he engaged in the proscribed conduct and to the manner in which that conduct is performed. The mental element of "knows"[12] narrows the

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[11] Goguen's act was wearing a small flag sewn to the seat of his pants. There was no allegation or evidence of physical desecration. The opinion characterized Goguen's conduct as "immaturity," "silly conduct," "casual treatment of the flag" and "informal use of the flag," 415 U.S. at 573,574, all vastly different matters from soaking a flag with lighter fluid and igniting it.

[12] Under Texas law, a person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist; a person acts knowingly, or with knowledge, with respect to a result of his conduct *when he is aware that his conduct is reasonably certain to cause the result*. TEX. PENAL CODE ANN. § 6.03(b) (Vernon 1974). The Texas Court of Criminal Appeals has acknowledged that "knowingly" has acquired a technical meaning not necessarily equivalent to the common, everyday usage of such word. *See Chance v. State*, 563 S.W.2d 812,815-816 (Tex. Crim. App. 1978). By burning the flag in the manner he did, Johnson was aware that his conduct was reasonably certain to cause serious offense.

statute to reach only intentional acts.[13] No actual serious offense need occur in order for the statute to be violated.[14] The statute is not inherently subjective.

On its face, § 42.09(a)(3) does not foreclose any individual from exercising his right to free speech. Nor does it prohibit any individual from using the flag or displaying the flag in informal ways to express his opinions. What is prohibited are clear, severe and flagrant acts of flag desecration.

IV. SECTION 42.09(a)(3) IS NOT UNCONSTITUTIONALLY OVERBROAD

In part, Johnson's overbreadth argument is premised on the incorrect assumption that the statute regulates "use," "display" and "misuse of the flag." Resp. Br. 24. To support this argument, Johnson sets forth a "laundry list" of conduct, based on the Flag Code, 36 U.S.C. §§ 174-177, which he claims the Texas statute would prohibit. Resp. Br. 28-29.

The federal Flag Code is directory in nature, not mandatory,[15] as use of the word "should" throughout

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[13] This mental element was absent from *Coates*.

[14] Thus, Johnson's argument that the "legal observers" were merely offended, as opposed to seriously offended, is beside the point.

[15] The federal Flag Code is not intended to proscribe behavior but is fashioned as an expression of prevalent custom and usage regarding display of the American flag. *Lapoila v. Dullaghan*, 63 Misc.2d 157, 311 N.Y.S.2d 435,438 (N.Y. Sup. Ct. 1979); *see also Holmes v. Wallace*, 407 F.Supp. 493, 496 (M.D. Ala.), aff'd, 540 F.2d 1083 (5th Cir. 1976); *State of Delaware ex rel. Trader v. Hodsdon*, 265 F.Supp. 308, 310 (D. Del. 1967).

those provisions clearly indicates. The Flag Code merely sets forth proper etiquette in dealing with the flag. No penalties, civil or criminal, apply to violations of its terms. Moreover, the customs discussed in the Flag Code relate to use and display of the flag, not to its desecration.

Section 42.09(a)(3) does not proscribe misuse or improper display of the flag; rather, it prohibits desecration of the flag. By defining "desecrate"[16] as "deface," "damage" or otherwise "physically mistreat" in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action, § 42.09(b) clearly proscribes only flagrant acts of physical abuse or destruction. The statute is not designed to regulate any of the examples suggested by Respondent.

V. SECTION 42.09(a)(3) IS DESIGNED TO REACH ONLY ACTIONS THAT PHYSICALLY DAMAGE OR DESTROY THE FLAG AND WHICH ARE, BY THEIR VERY NATURE, VIOLENT

Johnson insists that he "peacefully" burned the flag. Resp. Br. 1, 3, 8, 30. The apparent thrust of this argument is that he cannot be punished for flag desecration because no actual violence occurred.

The State fails to see how a wanton act of flagburning can be characterized as "peaceful;" by its very nature, the act is violent. Violence[17] was unquestionably done to the flag. Certainly Johnson has no claim that his act was

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[16] *See also Webster's New Collegiate Dictionary* 304 (1980).

[17] The First Amendment does not protect acts of violence. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886,916 (1982).

peaceful. Johnson burned the flag in a public place at the climax of a turbulent, destructive and potentially violent demonstration in the midst of a crowd of demonstrators and onlookers. Considering the surrounding demonstration and the intensely public place in which the act occurred, it can hardly be characterized as anything but "inherently inflammatory," literally, as well as figuratively. While it is true that no actual violence among persons occurred, this was merely fortuitous. It was the *response* of those who witnessed the act that was peaceful; the *act itself* was not. The fact that the *response* of those who witnessed the act was peaceful does not render the *act* peaceful.

In the case at bar, Johnson soaked the flag with lighter fluid and ignited it in the midst of a crowd of persons in an undisputedly public place. The flag was totally consumed. This is exactly the sort of violent conduct prohibited by the terms of § 42.09(a)(3).

VI. SECTION 42.09(a)(b) DOES NOT PERMIT CONVICTION BASED UPON WORDS OR ASSOCIATIONS

As Johnson acknowledges, nothing in the terms of § 42.09(a)(3) permits a conviction based upon words.[18] Resp. Br. 33-34. Likewise, nothing in the trial court's charge to the jury authorized conviction for any words

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[18] This is a crucial distinction from the statute condemned in *Street v. New York*, 394 U.S. 576 (1969), which prohibited speaking defiant or contemptuous words about the flag.

spoken.[19] (R.I-47-51). Johnson was prosecuted and convicted for an act of flag desecration, not for using foul language, engaging in contemptuous speech, or making disparaging remarks about the flag.[20]

While the trial prosecutor did, in final jury arguments, refer to Johnson's words and extraneous conduct throughout the course of the demonstration, all such evidence was intended to show the destructive, turbulent and potentially violent atmosphere in which the flagburning occurred. This was recognized by the intermediate court of appeals. J.A. 25.

It should also be noted that Johnson's defense[21] at trial was that he was not the flagburner. Texas permits criminal responsibility to be placed on one who, acting

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[19] In keeping with the instructions given by the trial court (R.I-47-51), the jury could not have returned a verdict of guilty based solely upon Johnson's "words and associations." Resp. Br. 33-34. To have rendered such a verdict could have constituted jury misconduct, a point not raised by Johnson either in Motion for New Trial or on direct appeal.

[20] In fact, Johnson's protestations that he was convicted because of his many and harsh words against this country and because of his associations with his fellow protesters evidences the significant alternative avenues of communication that the State of Texas *did* allow.

[21] Johnson did not testify in his own behalf at the guilt/innocence stage of the trial; all defensive evidence was presented by witnesses who had been observers of the demonstrations for the ACLU, an interesting coincidence since ACLU attorneys represented Johnson at trial and through the state appellate process and have appeared as *amici* on his behalf in this Court.

with the intent to promote or assist the commission of the offense, "solicits, encourages, directs, aids, or attempts to aid" another in the commission of the offense. TEX. PENAL CODE ANN. §§ 7.01,7.02 (Vernon 1974). The jury was charged under the law of parties. (R.I-49). This instruction was submitted without objection.[22] A "converse" charge was also submitted at Johnson's request. (R.I-49; R.V-629). Thus, it was incumbent upon the trial prosecutor to argue in favor of any theory under which Johnson could be found guilty. The fact that one may be guilty as a party to a violation of § 42.09 does not render the statute a prohibition on association.

CONCLUSION

Section 42.09 reflects the Texas legislature's attempt to define "with substantial specificity what constitutes forbidden treatment" of the flag. *See Smith v. Goguen*, 415 U.S. at 581-582. The statute is aimed at severe, flagrant and provocative acts of physical abuse and destruction of the flag, the symbol of this nation. Moreover, § 42.09(a)(3) proscribes only acts done in a public context which, by their very nature, are likely to create a breach of the peace. The language utilized by the statute – desecrate, deface, damage, physically mistreat – contemplates violent acts which are clearly intentional and malicious.

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[22] Error was, nevertheless, raised on this point on direct appeal. The intermediate court of appeals found no error, primarily because "the bulk of the State's argument was premised on Johnson's culpability as a sole actor." J.A. 24.

The Texas Court of Criminal Appeals erred in concluding that this statute violated the federal guarantee of freedom of speech as applied to Johnson. For the foregoing reasons, in addition to those urged in its brief on the merits, the State requests that the judgment of the Texas Court of Criminal Appeals be, in all respects, reversed.

Respectfully submitted,

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OCTOBER TERM, 1988

STATE OF TEXAS,

Petitioner,

v.

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

BRIEF OF THE LEGAL AFFAIRS COUNCIL AS AMICUS CURIAE

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No. 88-155

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

State of Texas,

Petitioner,

v.

Gregory Lee Johnson,

Respondent.

BRIEF OF THE LEGAL AFFAIRS COUNCIL AS AMICUS CURIAE

INTERESTS OF THE LEGAL AFFAIRS COUNCIL

The Legal Affairs Council is a non-profit organization dedicated to preserving the inherent and constitutional rights of the people. Of the highest priority to the Legal Affairs Council is the protection of individual

liberty guaranteed by the First Amendment to the Constitution. The Legal Affairs Council, with the written approval of both petitioner and respondent on file in the Clerk's office, submit this amicus curiae brief in support of the petitioner, the state of Texas.

This brief focuses primarily on application of Boos v. Barry, 485 U.S. ____, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) to the facts of this case. Our conclusion is that the holding of this Court in Boos does not control and was misapplied by the Texas Court of Criminal Appeals to the instant facts. The Legal Affairs Council appeared in the Boos case as an amicus, urging that the statute at issue there be struck down as an unconstitutional infringement on free speech. The Texas Court of Criminal Appeals relied heavily on Boos in holding that Texas Penal Code Section 42.09

(Vernon 1974) was unconstitutional in its application to Johnson. Because of its involvement in the Boos case, the Legal Affairs Council wishes to distinguish the Court's holding in Boos from the facts in this case and to argue the reasons why Boos should not have been applied by the Texas Court. The conclusion of the amicus curiae is that section 42.09 did not impose restrictions on Johnson's free speech rights, or in the alternative, that section 42.09 is a content-neutral restriction on conduct mixed with elements of speech, and thus under either approach, Boos is inapplicable. Additionally, we contend that the state of Texas has a substantial interest both in protecting the American flag as a symbol of our country and in preventing breaches of the peace, and these interests are clearly sufficient to satisfy the test in Boos for scrutiny of

laws that infringe on free speech.

SUMMARY OF ARGUMENT

The challenged statute, section 42.09, is not a regulation of speech, but a regulation of conduct. It prohibits desecration of the American flag, and Johnson violated the statute by publicly burning the flag. The statute did not affect Johnson's free speech rights, but regulated his conduct. There is no First Amendment protection for such conduct. However, assuming, for the sake of argument, that this Court will find Johnson's conduct to be a form of protected speech, we submit that Texas has a constitutional right to restrict such conduct in order to protect national emblems and other venerated objects.

The Texas Court of Criminal Appeals analyzed section 42.09 as a content-based restriction on speech and

applied the rule in this Court's opinion in Boos v. Barry as authority for reversing Johnson's conviction for violating section 42.09. We submit that Boos does not control this case because the Texas statute is a content-neutral regulation of conduct. As such, the statute meets the test for constitutionality most recently stated in Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

Should this Court determine that section 42.09 is in fact a content-based restriction on symbolic speech, we submit that the statute meets the test in Boos for such restrictions and that the Texas Court misapplied Boos to the facts before it.

The statute serves a compelling governmental interest and is narrowly tailored to suit that need. The statute

is a constitutional regulation of conduct that leaves open reasonable alternative avenues of expression.

ARGUMENT

I. THE PUBLIC BURNING OF AN AMERICAN FLAG DURING THE COURSE OF A POLITICAL DEMONSTRATION DOES NOT CONSTITUTE FREE SPEECH SUBJECT TO THE PROTECTION OF THE FIRST AMENDMENT.

It is the position of the amicus curiae that the act of flag burning no more rises to the level of protected speech than the act of burning a car to protest air pollution or traffic congestion, the act of burning a courthouse to protest a judicial decision, or the act of burning a ROTC building to protest the Vietnam War. See e.g., Street v. New York, 394 U.S. 576, 616, 89 S.Ct. 1354, 22 L.Ed.2d 572, (1969) (Fortas, J., dissenting); Smith v. Goguen, 415 U.S. 566, 593-94, 94 S.Ct.

1242, 34 L.Ed.2d 605 (1974) (Rehnquist, J., dissenting); Cantwell v. Connecticut, 310 U.S. 296, 303-04, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). "[T]he right of free speech is not absolute at all times and under all circumstances." Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

> This Court has long recognized, for example, that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language. See Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

Spence v. Washington, 418 U.S. 405, 417, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (Rehnquist, J., dissenting). We rely on the petitioner, however, to make this argument, and turn instead to the alternative question presented in the Petition for Certiorari, discussed below.

II. **ASSUMING THAT DESECRATION OF THE AMERICAN FLAG CARRIES SOME FIRST AMENDMENT PROTECTION, THE STATE OF TEXAS MAY PROPERLY RESTRICT CERTAIN CONDUCT IN ORDER TO PROTECT NATIONAL EMBLEMS AND OTHER VENERATED OBJECTS.**

Under the facts of this case, Johnson's burning of an American flag stolen from a nearby building was not protected speech, symbolic or otherwise. However, assuming, arguendo, that this Court will find Johnson's destruction of the flag to be a form of symbolic speech, Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974), U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); the question then becomes whether such conduct could be restricted by the state of Texas.

For the reasons that follow, we conclude that Texas has a legitimate, substantial interest in outlawing desecration of national emblems and other venerated objects, and that interest

outweighs any First and Fourteenth Amendment protection that may attach to Johnson's conduct.

A. BOOS v. BARRY DOES NOT CONTROL THIS CASE BECAUSE THE TEXAS STATUTE IS A CONTENT-NEUTRAL REGULATION OF CONDUCT.

In Boos v. Barry, 485 U.S. ___, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), this Court struck down a provision of the District of Columbia Code that made it unlawful to display within 500 feet of a foreign embassy any sign tending to bring a foreign government into public odium or disrepute. The Court found the statute to be a "content-based" restriction on political speech in a public forum, id., 99 L.Ed.2d at 343, and therefore, subjected the statute to "the most exacting scrutiny." Id., 99 L.Ed.2d at 345. The statute was content-based because it completely prohibited one

category of speech within 500 feet of an embassy, while all other catagories of speech, such as favorable speech about a government or speech concerning a labor dispute with a foreign government, were permitted. Id., 99 L.Ed.2d at 343.

As a content-based restriction, the statute was analyzed by this Court in accordance with separate legal theories; the Renton test and the Perry test. Id., 99 L.Ed.2d at 344-45, Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); Perry Education Assn. v. Perry Local Educators Assn., 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The Renton analysis was used to classify the statute as either "content-based" or "content-neutral," but it failed to gain the support of a majority of Justices. Boos, 99 L.Ed.2d at 353 (Brennan, J., concurring in part and concurring in the

judgment).

The Perry test indicates that content-based restrictions on political speech in public forums should be subjected to "the most exacting scrutiny." Boos, 99 L.Ed.2d at 345. "Thus, we have required the State to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" Id., 99 L.Ed.2d at 345. Perry, 460 U.S. at 45; Board of Airport Commissioners of Los Angeles v. Jews for Jesus, 482 U.S. ____, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987); Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); U.S. v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983).

The Perry test, as relied upon in Boos, was the foundation for the Texas

Court of Criminal Appeals' reversal of Johnson's conviction below. Johnson v. State, 755 S.W.2d 92, 96 (1988). But the reasoning of the Texas court is flawed because it reached the Boos/Perry test without first analyzing the Texas desecration statute to determine whether it is a content-based restriction on speech. We conclude, and submit that this Court should conclude, that the statute is clearly content-neutral. Hence, the Perry analysis should not have been applied to the facts in Johnson, and the Texas court's reliance on Boos as constitutional authority for reversing Johnson's conviction was inappropriate. Furthermore, the Texas court ignored a fundamental difference between the "classic political speech" at issue in Boos, 99 L.Ed.2d at 343, and the pointless, violent desecration of a national emblem at issue in Johnson.

This compounds the Texas court's error in relying on Boos.

1. The Texas Statute is Content-Neutral Under Either the Renton Test or the "Bright-Line" Rule.

In Boos, Justice O'Conner wrote that the total prohibition of peaceful display of signs containing words or slogans that might offend foreign dignitaries was a content-based restriction on speech.

> [W]e have held that a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibitions of public discussion of an entire topic.' Consolicated Edison Co. v. Public Service Comm'n., 447 U.S. 530, 537, 65 L.Ed.2d, 319, 100 S.Ct. 236 (1986). Here the government has determined that an entire category of speech--signs or displays critical of foreign governments--is not to be permitted.

Boos, 99 L.Ed.2d at 344.

The Court then defined content-

neutral restrictions on speech as those that "are justified without reference to the content of the regulated speech," Id. (emphasis original), Renton, 475 U.S. 41, 48, 96 S.Ct. 1817 (1986), Virginia Pharmacy Board v. Virginia Consumer Council, Inc., 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). One need not look only to the speech being regulated, Justice O'Conner wrote, but also to the justifications for the regulation. "So long as the justifications for the regulation have nothing to do with content . . . we concluded that the regulation was properly analyzed as content-neutral." Boos, 99 L.Ed.2d at 344. But see concurrence of Justice Brennan at 353, in which a call for use of the traditional

"bright-line" test is made.[1]

The Texas statute at issue here meets either the Renton or the "bright-line" test. The statute does not

[1]In his concurrence, Justice Brennan, joined by Justice Marshall, stated his preference for the traditional approach. "[T]he Renton analysis provides none of the clear lines or sanctuaries the First Amendment demands." Boos, 99 L.Ed.2d at 354. Brennan called for use of the "bright-line" rule: "any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it." Id.

> The traditional rule thus provides clear guidance. Governments can ascertain the scope of impermissible regulation. Individuals can ascertain the scope of their constitutional protection. The Renton analysis, in contrast, plunges courts into the morass of legislative motive, a notoriously hazardous and indeterminate inquiry, particularly where, as under the Renton approach, the posited purpose flies in the face of plain statutory language.

Id. While the choice of tests is an apparently unresolved doctrinal matter for the Court, we submit that section 42.09 remains clearly content-neutral under the Renton analysis or the traditional "bright-line" rule.

regulate speech at all. It prohibits certain conduct by providing punishment for any person who desecrates a venerated object, defined as a state or national flag, a public monument, a place of burial or worship. Johnson v. State, 706 S.W.2d 120, 122 (Tex.App. Dallas 1986). The statute makes no distinction whatsoever between favorable or unfavorable speech. It merely states that certain objects shall not be desecrated. Furthermore, the justification for the statute clearly and plainly has nothing to do with the content of speech. The obvious justification is to prevent destruction or defacement of objects that the people of Texas have decided should not be destroyed or defaced. While it may be unlikely that the desecration of a venerated object would be performed by those espousing patriotic themes, it is

not impossible. The point is, such conduct is prohibited at all times for all reasons. Accordingly, the statute is "content-neutral."

In Renton, where a zoning ordinance banning adult motion picture theaters within 1,000 feet of residential neighborhoods was in question, the Court first sought to determine whether the ordinance was a content-based or content-neutral regulation of speech before analyzing its constitutionality. Renton, 475 U.S. at 47.

The Court reiterated its long-held view that "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment." Id. See Carey v. Brown, 447 U.S. 455, 462-63, and n. 7, 100 S.Ct. 2286, 65 L.Ed. 2d 263 (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 98-99, 925 S.Ct.

2286, 33 L.Ed.2d 212 (1972). "At first glance, the Renton ordinance . . . does not appear to fit neatly into either the 'content-based' or the 'content-neutral' category." Renton, 475 U.S. at 47. The Court concluded, however, that the total ban of adult theaters within 1,000 feet of residential neighborhoods "is aimed not at the content of the films shown at 'adult motion picture theaters,' but rather at the secondary effects of such theaters on the surrounding community." Id. (emphasis original). Accordingly, the statute there was classified "content-neutral." Having made that determination, the Renton Court then said that the next appropriate inquiry is [1] whether the ordinance is designed to serve a substantial governmental interest and [2] whether it allows reasonable alternative avenues of communications. Id. at 50 (citing Clark v. Community for

Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 649, 654, 69 L.Ed.2d 298, 101 S.Ct. 2559 (1981)). This two-part inquiry is the appropriate next step of analysis, whether the Court follows the Renton test or Justice Brennan's "bright-line" test.

The two-part inquiry is not unlike the four-part test set forth in U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, (1968).[2] There, considering whether burning a draft card in violation of law was an unconstitutional

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[2]The Texas Court of Criminal Appeals believed that O'Brien was rejected by this Court. Johnson v. State, 755 S.W.2d at 94 n. 4. The court cited Spence, 418 U.S. at 414 n. 8, as support for its assertion. We submit that the Texas court has misread Spence and we believe O'Brien remains valid authority where conduct mixed with elements of speech is at issue, as opposed to the "symbolic speech" at issue in Spence.

infringement on symbolic free speech, the Court held that when "speech" and "nonspeech" elements are combined in the same course of conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." O'Brien, 391 U.S. at 376 (emphasis added). A regulation of such nonspeech conduct was said to be sufficiently justified:

> [1] if it is within the constitutional power of Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377. The two-part Renton test for content-neutral restrictions on First Amendment freedoms adds the "reasonable alternative avenues of communications" element to the "substantial governmental

interest" prong. (The Amicus submits that the first element of the O'Brien test--that the regulation be within the power of government to enact--is actually an implied part of the Renton test, or any other test of a statute or regulation. The third element in O'Brien is satisfied by the plain meaning of section 42.09. The fourth element may have been subsumed in the "alternative avenues of communications" prong of Renton.)

We submit that Texas Penal Code Section 42.09 is a content-neutral regulation of symbolic speech, or, alternatively, a regulation of the nonspeech element of conduct that may be combined with speech. The standard set forth in Renton, or the similar standard of O'Brien, or a combination of the two, should be the test applied to the facts in this case. Clearly, Section 42.09

meets either the Renton or the O'Brien test, as is discussed below. The Texas Court of Criminal Appeals wrongly applied a content-based restriction of speech analysis, in reliance on the Perry test used in Boos, and found that the statute was overbroad, and thus unconstitutional as applied to Johnson. To so find was reversible error.

2. The Governmental Interest.

The state of Texas, like every other state in the Union, has a substantial interest in preventing desecration of its state and national flags, monuments and places of worship. The state also has an interest in preserving the peace. Those interests are served by Texas Penal Code Section 42.09.

a. **The National Emblem.**

The interest served by protecting the national emblem is so well-known to this Court that, but for the importance of this case, it would not warrant review. Nonetheless, a few quotations from past opinions of members of this Court serve to summarize the interest asserted by Texas:

> One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes. Conceived in this light, I have no doubt about the validity of laws designating and describing the flag and regulating its use, display, and disposition.

Smith v. Goguen, 415 U.S. 566, 587, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974) (White, J., concurring).

Justice Rehnquist, agreeing with Justice White's sentiments, added:

> The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry,

cannot be fully expressed in the two dimensions of a lawyer's brief or of a judicial opinion. But if the Government may create private proprietary interests in written work and in musical and theatrical performances by virtue of copyright laws, I see no reason why it may not, for all of the reasons mentioned, create a similar governmental interest in the flag by prohibiting even those who have purchased the physical object from impairing its physical integrity. For what they have purchased is not merely cloth dyed red, white, and blue, but also the one visible manifestation of two hundred years of nationhood--a history compiled by generations of our forebears and contributed to by streams of immigrants from the four corners of the globe, which has traveled a course since the time of this country's origin that could not have been "foreseen . . . by the most gifted of its begetters."

Id., 415 U.S. at 602-03 (dissenting).

In the same case, Justice White in his concurrence, said:

> There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag. Congress may provide for the general welfare, control interstate commerce, provide for the common defense and exercise any powers necessary and proper for those ends. These powers, and the inherent attributes of sovereignty as well,

> surely encompass the designation and protection of a flag. It would be foolishness to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new Nation, Act of Jan. 13, 1794, 1 Stat 341, cl, just as they had for the Union under the Articles of Confederation. 8 Journals of the Continental Congress 464 (June 14, 1777).

Id., 415 U.S. at 586. In this nation created by the power and authority of the sovereign states, we submit that the states retain the power to protect the emblem of the nation they created. See Tenth Amendment, U.S. Constitution.

. . .

> The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it.

Id., 415 U.S. at 587.

. . .

> There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. The flag is itself a

> monument, subject to similar protection.

Id.

In Street v. New York, 394 U.S. 576 (1969), Chief Justice Warren stated simply: "I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace." 394 U.S. at 605 (dissenting). In the same case, Justice Fortas opined logically that:

> The test that is applicable in every case where conduct is restricted or prohibited is whether the regulation or prohibition is reasonable, due account being taken of the paramountcy of First Amendment values. If, as I submit, it is permissible to prohibit the burning of personal property on the public sidewalk, there is no basis for applying a different rule to flag burning. And the fact that the law is violated for purposes of protest does not immunize the violator. United States v. O'Brien, 391 U.S. 367 (1968); see Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).
>
> Beyond this, however, the flag is a special kind of personalty. . . . A person may "own" a flag, but ownership is subject to special burdens and responsibilities. A flag may be

> property, in a sense; but it is property burdened with peculiar obligations and restrictions.

Id. 394 U.S. at 616-17 (dissenting).

The governmental interest in protecting the flag is clear. Indeed, it is the essence of nationhood. It is the same interest that the government has in protecting the Constitution, the Declaration of Independence, the Capitol Building or the Washington Monument. A state government has an identical interest in protecting the flag of the Union to which it belongs, or its state flag, state capitol or a state monument. The American flag has been carried into battle as the symbol of nationhood for all Americans, including those who dissent from national policy or politics. The flag is not a device for symbolic destruction, but a landmark for freedom. It is not a rope for a tug-of-war between opposing political groups. It is what

flies over the tug-of-war, standing guard for free speech and assembly, protecting the right of dissent, immune from tarnish by the words of discourse. "Since the flag symbolizes the entire nation, not just one particular political philosophy, the state may determine that it be kept above the turmoil created by competing ideologies." Deeds v. State, 474 S.W.2d 718 (Tex.Cr.App. 1972), questioned in Johnson v. State, 755 S.W.2d at 94 n. 4.

While this Court's cases speak in terms of "governmental interest" in the regulation of speech, it is not so much a "governmental" interest as it is an interest of the people. Section 42.09 stands as an expression of the will of the people of Texas, not their government. Section 42.09 is a law enacted by the elected representatives of the people and it stands as an expression of their values. They have said that the

flag of this nation is a venerated object. And their law is in no way directed at any citizen's right to speak freely. It merely states that the flag of this country is a symbol for all of the people, and it shall not be desecrated.

How ironic for an institution of government created by the people to deny them the right to hold sacred the symbol of their nationhood. This statute leaves speech free and robust, the clash of ideas flourishing. What it proscribes is the desecration of our nation's symbolic soul by acts of vandalism, regardless of the motives of the vandal.

b. **Preserving the Peace.**

A breach of the peace is not required in every instance in order for a state to legislatively restrict conduct that is likely to result in a breach. See

Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295 (1951). Although not specifically mentioned in the statute, the state of Texas has clearly asserted an interest in preventing breaches of the peace in its effort to have the statute upheld. Johnson v. State, 706 S.W.2d at 123. It is generally recognized that flag desecration statutes serve the purpose of preventing breaches of the peace and such a purpose is valid and important. Monroe v. State Court of Fulton County, 571 F. Supp. 1023, 1027 (N.D. Ga. 1983), rev. on other grounds 739 F.2d 568 (11th Cir. 1984). "That the state has a legitimate interest in preventing beaches of the peace which can result from reactions to any attempted defilement of the flag has long been recognized." State v. Waterman, 190

N.W.2d 809, 811 (Iowa 1971). And the state's interest "in preserving the peace, is totally unconnected to the suppression of free expression." Sutherland v. DeWulf, 223 F. Supp. 740, 745 (S.D. Ill. 1971).

Should this Court find, as the Texas court did, that the state has no substantial interest in protecting the flag as a national symbol, surely this Court will conclude, as it has in the past, that the state has an interest in restricting and preventing breaches of the peace. Street v. New York, 394 U.S. at 590-92.

Addressing this issue, the Texas court concluded that there was no breach of the peace associated with Johnson's conduct and, therefore, there was no state interest being served by Section 42.09. But the inquiry should have been whether Johnson's desecration of the flag

created a risk of breach of the peace. The term "risk" does not mean that breach must have occurred or even been imminent. State v. Farrell, 223 N.W.2d 270, 272 (Iowa 1974), app. dismissed, 421 U.S. 1007, 95 S.Ct. 2410, 44 L.Ed.2d 675 (1975).

> On the contrary, it denotes nothing more than words or conduct creating exposure to a chance, danger, hazard or peril of breach of peace. See "Risk" Webster's Third International Dictionary, Unabridged at 1961; 77 C.J.S. Risk at 441.

Id., 223 N.W.2d at 272.

Indeed, the desecration and molestation of the flag by burning in a public place "is an act having high likelihood to cause breach of the peace." Sutherland, 323 F. Supp. at 745.

> Taking into account the deeply held and emotional zeal with which so many of our countrymen understandably revere the flag itself, its public desecration by disrespectful burning is an act of incitement as fraught with danger to the public peace as if a person would stand on a street corner shouting derogatory remarks at passing

> pedestrians. See Chaplinisky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942).

Id. As this Court held long ago,

> it has often occurred that insults to the flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

Halter v. Nebraska, 205 U.S. 34, 41, 27 S.Ct. 419, 421, 51 L.Ed. 696 (1907).

Actual disturbance should not be the test for a breach of the peace standard, particularly when the act sought to be regulated is conduct and not pure speech. If any act is likely to provoke a breach of the peace, such acts should properly be prohibited for three reasons:

> By prohibiting acts which may produce violence or a breach of the peace, the government deters both of these acts and, proportionally, a smaller number of outbursts that the acts may produce.
>
> Secondly, it is appropriate for the government to set certain standards of conduct in order to guide members of

the community as to those acts that ought to be punished.

> Finally, an act of flag desecration with no resulting violence, is similar to driving while intoxicated with no ensuing accident. Drunk driving is to be discouraged because of the possibility of danger increases when drivers are drunk, much in the same way certain anti-social acts may result in violence.

Rosenblatt; Flag Desecration Statutes: History and Analysis, 1972 Wash. U. L. Q. 173, 216 (1972).

We submit that the act of flag burning in a public setting could and should be classified by this Court as a breach of peace, per se. While we could find no direct authority in support, there are cases where words by themselves were held to be a breach of the peace, Chaplinisky, supra, and other cases in which flag desecration was held to be so likely to result in a breach as to satisfy the state's interest in preventing a breach by regulation. See,

e.g., Sutherland v. DeWuff, 323 F.Supp. at 745; State v. Royal, 113 N.H. 224, 305 A.2d 676, 680 (1973); State v. Mitchell, 32 Ohio App.2d 16, 288 N.E.2d 216, 226 (1972); State v. Waterman, 190 N.W.2d 809, 811-12 (Iowa 1971). Such a classification is a logical and reasonable conclusion drawn from the inherent danger connected with an open fire in a volatile public setting. Such a classification would settle for all time lingering questions that might otherwise be left unanswered by this Court's decision in this case as to whether other state or national laws on this subject satisfy the "state interest" test.

3. A Reasonable Alternative Avenue of Expression.

If this Court accepts the notion that there is a substantial and important

"governmental" interest in preserving the integrity of the flag or in preventing breach of the peace, then this Court should next consider whether Section 42.09 leaves open reasonable alternative avenues of communication. Renton, 475 U.S. at 50. The answer to that query is an overwhelming "Yes." Merely consider the trial court record:

The flag was burned in connection with a protest in Dallas during the 1984 Republican National Convention. The protestors initially stopped at the LTV Tower and traveled to the bottom floor, an area where shops are located. (R. II-71).[3] At this point, the protestors conducted a "die-in," an event wherein the protestors would count down from 10

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[3]References to the record below are as follows: The notation "R.II" through "R.VI" refers to the five volumes of the statement of facts or court reporter's transcriptions from the trial court.

and then fall to the floor moaning and yelling for approximately three to four minutes (R. II-72). Apparently, this demonstration was designed to represent the force and effect of a nuclear explosion. After the "die-in", the marchers walked through Thanksgiving Square and entered the Republic Bank building. (R.II-73) There, the protestors seized and tore up deposit slips, pulled up plants and dumped soil on the ground. (R.II-75)

The march then moved toward the Diamond Shamrock building. The management of this building, evidently knowing in advance of the march, caused the door of this building to be locked. Upon learning this, the protestors beat on the windows, and spray-painted the walls and the windows of the building. (R.II-76). The group then traveled to the Plaza of the Americas complex. Here the

marchers overturned potted plants and spray-painted the floor. (R.II-79). The group then went by sky-walk to the Southland Life building. Various protestors sprayed the floor and walls of the sky-walk. (R.II-81). After another "die-in" at the park, the marchers moved towards the Mercantile National Bank building. (R.II-82). There were three flag poles in front of this building, and one of them bore an American flag. Protestors bent all three poles; one protestor took down the American flag and gave it to Johnson. (R.II-83-84). The protestors next moved to the Dallas Power & Light Company building, where the doors were locked. As they had done before, the protestors spray-painted the windows and beat against them with their fists. (R.II-85). A short time later, the marchers conducted another "die-in" in front of the Southwestern Bell building.

During this "die-in," Officer Stover saw Johnson "shooting the finger" with both hands, saying, "Fuck you, America." (R.II-86-87). Indeed, as the march progressed, Officer Stover heard Johnson shout slogans such as: "Fuck you," "Fuck you, America," and "Fuck the Republicans." (R.II-78).

After a stop at the Federal Reserve building, where the protestors again spray-painted and beat against the windows, the group ended up in front of the Dallas City Hall. (R.II-87-88). There, Officer Stover saw the United States flag being burned while protestors chanted, "America, the red, white and blue, we spit on you." (R.II-91).

Not a single aspect of Johnson's protest that arguably could be classified as speech would be restricted, infringed or punished by Section 42.09, if the

constitutionality of that Section is upheld. In fact, the Texas intermediate appellant court found that the statute "in no way prohibited legitimate protest activities." Johnson v. State, 706 S.W.2d at 122. If the constitutionality of the statute is upheld, the freedom of speech as exercised by Johnson and his group could continue, such as it was, unimpeded by the anti-desecration statute. The protestors could continue to carry their signs and speak their contemptible words. They could express their contempt for everything American, yet 42.09 would not interfere. Whatever point Johnson and his group were trying to make, they could still try to make it. It is difficult to imagine a more vigorous protest, or a more unrestricted forum for the expression of dissent. Johnson would only transgress Section 42.09 if he were to burn the state or

American flag, or desecrate some other venerated object.

To summarize Part A, this Court has long held that even protected speech may be subject to reasonable limitations when important countervailing interests are involved.

> Citizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare. The right of free speech, though precious, remains subject to reasonable accommodation to other valued interests.

Spence, 418 U.S. at 417 (Rehnquist, J., dissenting). The people of Texas have said the flag is just such a valued interest.

B. EVEN IF SECTION 42.09 IS HELD TO BE A CONTENT-BASED RESTRICTION OF SPEECH, THE TEXAS STATUTE SURVIVES THE BOOS/PERRY TEST.

The Texas Court of Criminal Appeals, by finding that Section 42.09

was not narrowly drawn, Johnson v. Texas, 755 S.W.2d at 96, relying on Boos, apparently concluded that Section 42.09 was content-based restriction on speech. However, there was no discussion by the court as to how this determination was reached. The court drew from Boos the test set forth in Perry, supra, for scrutiny of content-based restrictions on speech, to determine if the statute could stand. The court, misapplying the Boos/Perry test, ruled the statute was overly broad. We submit that the statute is sufficiently narrow to survive the Perry test.

In Boos, Part I B, which had the support of a majority of Justices, the Court ruled that a content-based restriction on speech in a public forum must be subjected to exacting scrutiny to stand, in accordance with the Perry test. The state must show [1] a compelling

state interest served by the statute and [2] the statute must be narrowly drawn to achieve that end. Boos, 99 L.Ed.2d at 342, 345. Perry, 460 U.S. at 45.

The display clause in Boos was a restriction on classic political speech, Boos, 99 L.Ed.2d at 343; that is, political slogans displayed peacefully on signs and placards in a public place. Desecration by burning an American flag is not "classic", "speech" or "peaceful", but in any event, the Texas Court of Criminal Appeals found desecration and picketing similar enough to apply the Boos/Perry test to the Johnson facts. Johnson, 755 S.W.2d at 96.

The Texas court found no compelling state interest in preserving and protecting the nation's most visible symbol of its existence. The court summarized:

If the State has a legitimate

> interest in promoting a State approved symbol of unity, that interest is not so compelling as to essentially license the flag's use for only the promotion of governmental status quo.

Johnson, 755 S.W.2d at 97. This reasoning is flawed. The flag can be and is "used" by those who advocate change in the governmental status quo -- it is waived or carried at gatherings representing all points on the philosophical compass.

The court further concluded that because West Virginia State Board of Education v. Barnett, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), O'Brien and Boos, require that there be a legitimate threat that the government stands to lose its interest in the flag as a symbol in order to uphold violations of federal free speech guarantees, the court ruled that it "must hold that the interest of providing a symbol of unity is inadequate to support Section

42.09(a)(3)." Johnson, 755 S.W.2d at 97. But the Texas court misreads Barnett, O'Brien, and Boos, and as discussed in part A 1 above, we submit that the Texas court virtually ignores the people's interest in their nation's flag.

The Texas court also found that since there was no breach of the peace, as viewed by that court, connected with Johnson's conduct, then the state's interest in preventing breaches of the peace was not served by Section 42.09 in this case. Id., 755 S.W.2d at 96. Assuming this Court agrees that Texas has a compelling interest in its venerated objects or in preserving the peace, and assuming, arguendo, that the Court finds Section 42.09 to be a content-based restriction on speech, the question remains whether the statute is unconstitutionally overbroad. Boos, 99 L.Ed.2d at 345. The crucial inquiry,

then, is "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The answer is that Section 42.09 does not prohibit what may not be punished for this reason: Flag desecration is not protected speech. Alternatively, flag desecration is conduct connected with elements of speech and may properly be regulated, pursuant to O'Brien. At best, it is symbolic speech and may be properly regulated because the statute is narrowly tailored to serve the state's interest: protecting the national emblem and preserving the peace.

Nonetheless, the Texas court's decision turned on the court's belief that a less restrictive alternative existed to Section 42.09. Johnson, 755

S.W.2d at 96 (relying on Boos, 99 L.Ed.2d at 350). "When a statute which restricts speech is under attack for overbreadth, the existence of another legislative alternative which would further the goal of the challenged statute may be used to prove that the challenged statute is overbroad." Johnson, 755 S.W.2d. at 96. The court cited no authority for that proposition. In its next sentence, though, it did mention Boos, noting that this Court compared the District ordinance in question there with 18 U.S.C. Section 112(b)(2), which served the same interest as the challenged District ordinance. The Texas court then quoted from Boos, thus:

> [W]e conclude that the availability of alternatives such as section 112 amply demonstrates that the display clause is not crafted with sufficient precision to withstand First Amendment scrutiny. It may serve an interest in protecting the dignity of foreign missions, but it

> is not narrowly tailored; a less restrictive alternative is readily available. Thus, even assuming for present purposes that the dignity interest is "compelling," we hold that the display clause of section 22-1115 is inconsistent with the First Amendment.

Johnson, 755 S.W.2d at 96 (quoting Boos, 99 L.Ed.2d at 350).

The Texas court then compared Texas Penal Code Section 42.01, the state "fighting words" statute, with Section 42.09. The court held that Section 42.01 was a less restrictive alternative to 42.09 because it explicitly prohibits utterance likely to incite an immediate breach of the peace, where 42.09 is directed at desecrations that the actor "knows will seriously offend one or more persons likely to observe or discover" the act. That language, the court stated, is so broad that it "may be used to punish protected conduct which has no propensity to result in breaches of the peace." Johnson, 755 S.W.2d at 95. This

statement is perplexing since the Texas court specifically ruled that the statute was unconstitutional as applied to Johnson, id. at 97, even though there was clear evidence of "serious offense" to others (R.II-92; R.III-222). 'And yet the court seems to have made its ruling based on what might happen at some other time in the future, which would be inappropriate.

This Court has long held that as a general rule, "when a criminal charge is based on conduct constitutionally subject to proscription and clearly forbidden by a statute, it is no defense that the law would be unconstitutionally vague if applied to other behavior." Coates v. City of Cincinnati, 402 U.S. 611, 618, 91 S.Ct. 1686, 29, L.Ed.2d 214 (1971) (White, J., dissenting). An exception to the general rule is created, however, where the statute at issue "purports to

regulate or proscribe rights of speech or press protected by the First Amendment." Id. at 619; see U.S. v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629, (1967); Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951).

> Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute.

Coates, 402 U.S. at 619-20. But the Texas statute does not "purport to regulate or proscribe rights of speech or press." This is the crucial distinction missed by the Texas court. Section 42.09 does not regulate speech. The court should have applied the general rule,

that is, whether the statute was unconstitutionally applied to Johnson, and the court should not have concerned itself with whether the statute "may be used to punish protected conduct . . ." Johnson, 755 S.W.2d at 95 (emphasis added). The issue before the Texas court, under this analysis, was whether the statute was unconstitutional in its application toward Johnson, and clearly it was not.

1. The Texas Statute Was Narrowly Tailored To Satisfy The Asserted Government Interest.

If the Texas Court of Criminal Appeals has correctly concluded that Section 42.09 is a content-based restriction on the speech, then that court wrongly concluded that this Court's holding in Boos requires reversal of Johnson's conviction. The two-part Boos/Perry test has been met under the

facts in this case. The state of Texas has a substantial interest in preserving the flag and preventing breach of the peace, and the statute is narrowly drawn to meet that need.

The Texas court misread Boos to require a test of comparing statutes to prove overbreadth.[4] We submit that the

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[4]If such comparisons are the proper standard for overbreadth analysis, it would be more appropriate to compare section 42.09 to other flag desecration statutes. Section 42.09 is a marked improvement over its predecessor, Article 152, Vernon's Ann. P.C., which provided: "Any person who shall within this State, publicly or privately, mutilate, deface, defile, defy, tramp upon, or cast contempt upon, either by word or act any flag...of the United States..." (emphasis added). See Delorme v. State, 488 S.W.2d 808, 810 (Tex.Cr.App. 1973). The underlined language, of course, was held to be unconstitutional by this Court in Street v. New York, supra. The federal desecration statute, 18 U.S.C. section 700, provides a pertinent part, "Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be..." See Smith v. Goguen, 415 U.S. at 583, n.30 (discussion of section 700's legislative history) and n.31 (discussion of Uniform

(footnote continued)

comparison in Boos of the District and federal statutes at issue is limited to the facts of Boos, where (1) both statutes originally were enacted by Congress, (2) Congress went on to reform

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(continued footnote)
Flag Law of 1917, adopted in some form by many states). In Virginia, where the uniform flag act was amended in 1975, section 18.2-488 provides, "No person shall publicly burn with contempt, mutilate, deface, defile, trample upon . . . any such flag..." In Georgia, the relevant statute provides, "[a] person who deliberately mutilates, defaces, or defiles the flag of the United States...is guilty of a misdemeanor." Georgia Code Ann. Section 26-2801. The common thread of these laws, including Texas', is the subjective element of "contempt," "offense," "knowingly," and are, we submit, distinctions without a substantive difference. Virtually any law, said Justice Rehnquist, "when viewed with sufficient ingenuity, could be thought to interfere with some citizen's preferred means of expression." Spence, 418 U.S. at 417 (dissenting). And yet a "statute is not required to be drawn with the precision of chemical formula or a mathematical equation. Only a reasonable degree of certainty is required in order that fair notice be given to those of ordinary intelligence." State v. Waterman, 190 N.W.2d 809, 813 (Iowa 1971); Hoffman v. U.S., 256 A.2d 567,569 (D.C.App. 1969).

the federal statute while the District delayed, (3) the District's statute was about to be repealed, and (4) the federal statute was about to be extended to the District. Boos, 485 U.S. at 349. Furthermore, the statute in question in Boos restricted "classic political speech." The same cannot be said of either the Texas statute or of Johnson's conduct at the Dallas City Hall. Additionally, this Court, "relying on congressional judgment in this delicate area," Boos, 99 L.Ed.2d at 349-50, concluded that the availability of alternatives such as the federal statute demonstrated that the display clause was not crafted with sufficient precision to withstand First Amendment scrutiny. We submit the District's ordinance was held not to be narrowly tailored not only because a less restrictive alternative was readily available, but also because

of evidence of congressional judgment in an alternative statute that was in the process of being made applicable to the District.

Clearly, that is not the situation with respect to the Texas statutes at issue. The Texas "fighting words" statute, Section 42.01, covers a broad range of disorderly conduct that tends to incite a breach of the peace. Section 42.09, on the other hand, deals only with overt physical acts of desecration of certain objects. Desecration is specifically defined and limited under Section 42.09 to certain enumerated actions. Thus, Section 42.09 is narrowly tailored to fit a certain specific need; in this case, the prevention of flag desecration by public burning. Section 42.01, on the contrary, does not address the same basic interest as Section 42.09

and, thus, cannot be considered a "less restrictive alternative."

2. No Protection for Violent Acts.

An additional argument against the overbreadth holding below is supported by this Court's continuing belief that "where demonstrations turn violent, they lose their protected quality as expression under the First Amendment." Boos, 99 L.Ed.2d at 351; Grayned, 408 U.S. at 116. While mistreatment of the flag in protest or in a demonstration may be protected "symbolic speech," according to Street, Spence and Smith, such mistreatment should lose its protection once the flag is set afire, a per se breach of the peace. (See discussion at pp. 34-35, above). Once the protection of the First Amendment is lost, the scrutiny for overbreadth of the statute is lessened, and it becomes clearer that

statute is appropriately tailored to serve the state's interest.

3. Statutory Construction.

The Texas Court of Criminal Appeals, relying on Boos, ruled that Section 42.09 is so broad that it may be used to punish protected conduct. Johnson, 755 S.W.2d at 96. But, it is the duty of the court, "if it can be done, to construe a statute so that it will remain valid." Delorme v. State, 488 S.W.2d 808, 811 (Tex.Cr.App. 1973); see, e.g. Boos, 99 L.Ed.2d at 350-51; New York v. Ferber, 458 U.S. 747, 769, n. 24, 102 S.Ct. 3348, 73 L.Ed.2d 1113, (1982); U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 368-70, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). The test for determining whether a statute is unconstitutional on its face because it is so vague and indefinite that it gives

no warning of what acts or conduct transgresses the statute and therefore are violative of due process is whether a person of ordinary intelligence, who would be law-abiding, can determine with reasonable precision what conduct it is his duty to avoid. Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948); U.S. v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1946); Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). The Texas Court of Appeals, the intermediate court, applied such an analysis to Section 42.09. It found that:

> Due process does not demand that the words used in a statute be specially defined. Words defined in dictionaries and with meanings so well known as to be understood by a person of ordinary intelligence are not to be considered vague and indefinite. Here, the relevant terms of the offense, "deface," "damage," and "physically mistreat" are all well understood terms. The act of burning the United States flag would clearly constitute desecration under the statute.

Johnson, 706 S.W.2d at 122.[5]

Continuing, the intermediate Texas court found that the statute was not overbroad because, "[a] statute is overbroad when it prohibits both activity which is protected by the constitution and activity which is not. . . . While the flag burning did occur during a

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[5]Johnson contended below that the statute is unconstitutionally vague because "desecration" depends upon the sensibilities of persons likely to observe the action under part (b) of section 42.09. Johnson, 706 S.W.2d at 122. Should this Court find fault with the "seriously offend" language, we submit that no Stromberg problem arises since Johnson was clearly convicted under (a) (3) of the statute, and (a)(3) can stand alone with its plain meaning intact without part (b). Part (b) might be relevant if Johnson had taken some marginal action toward the flag, but a public burning in the context of the instant facts is "desecration" as that word is plainly understood. See Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed 1117 (1931).

political protest rally, the statute in no way prohibited legitimate protest activities." Id.

The Texas Court of Criminal Appeals did not view the statute in the same way. We submit that the intermediate court adopted a reasonable, logical and compelling reading of the statute as applied to the facts before it. Should construction of 42.09 become an issue before this Court, we submit the Court can adopt the intermediate Texas court's interpretation. "[F]ederal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." Boos, 99 L.Ed.2d at 350-51 (emphasis added). Johnson's conduct was well within the meaning of the words "desecration," "deface," "damage," and "physically mistreat." We urge this Court to so construe Section

42.09, if necessary, and uphold its constitutionality.

CONCLUSION

The relief requested by petitioner, the state of Texas, should be granted. Several errors were committed by the Texas Court of Criminal Appeals, requiring reversal of its decision.

The court below mistakenly viewed Johnson's conduct as "symbolic speech" protected by the First Amendment. It then applied the test set forth in Boos to the statute at issue and found it to be overly broad and, thus, unconstitutional. We submit that Boos is inapplicable to this statute or these facts. The statute at issue does not regulate speech, but conduct, or in the alternative, it is a content-neutral regulation of "symbolic speech" and serves a substantial government interest

while leaving open "reasonable alternative avenues of communication."

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IN THE

Supreme Court of the United States

October Term, 1988

THE STATE OF TEXAS,

Petitioner,

v.

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION, VETERANS OF FOREIGN WARS OF THE U.S., NATIONAL FLAG FOUNDATION, AMVETS, AIR FORCE ASSOCIATION, AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER.

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Amici curiae the Washington Legal Foundation, *et al.*, hereby move this Court pursuant to Supreme Court Rules 36.1 and 42.2(b) for leave to file the annexed Brief *Amici Curiae* in support of the petitioner in this case. Counsel for petitioner has expressed his written consent to the filing of this brief. However, counsel for respondent, who is listed as counsel of record in this case, has indicated that he no longer represents respondent and that the respondent should be contacted directly. Despite written requests and other efforts to contact respondent, no response has been received, and therefore, this motion is necessary.

INTERESTS OF *AMICI CURIAE*

Amicus the Washington Legal Foundation (WLF) is a non-profit public interest law and policy center organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 120,000 members and supporters throughout the United States and Texas whose interests the Foundation represents.

WLF has devoted a substantial amount of its resources to cases relating to governmental regulations and constitutional law. WLF has participated in numerous cases before this Court as *amicus*, party, or counsel to party, including cases pertinent to the case at bar relating to the First Amendment. *See, e.g. Boos v. Barry*, 108 S.Ct. 1157 (1988). WLF seeks to present to this Court a broader perspective of the issues raised in this case than the parties directly involved in the case in order to assist this Court is the disposition of this matter.

Amicus Veterans of Foreign Wars of the U.S. is a federally chartered corporation whose nearly two million men and women members worldwide, including many in Texas, served their country honorably in overseas engagements for which a campaign badge or medal has been authorized. As expressed in its federal charter, its purposes are "fraternal, patriotic, historical, and educational...[and] to maintain true allegiance to the government of the United States of America and fidelity toits constitution and laws; to foster true partiotism...and to preserve and defend the United States from all her enemies whomsoever." As part of its mission, the VFW, throught its 10,000 Posts around the world, promotes respect and love for the Flag that their members have defended in battle.

Amici National Flag Foundation (NFF) is a non-profit patriotic and educational organization with its headquarters at Flag Plaza in Pittsburgh, Pennsylvania. NFF devotes its resources to producing literature, programs, and activities which stimulate enhanced appreciation for America's heritage, liberty and Flag. It is widely recognized as this country's leading organization devoted to promoting respect for the Flag among millions of citizens, especially the nation's youth.

Amicus AMVETS, originally formed in 1943, was federally chartered by Congress in 1947 and represents American Veterans who fought in World War II. Since then, AMVETS, headquartered in Lanham, Maryland, has become to represent also those men and women who fought in Korean and Vietnam. On May 31, 1984, President Reagan signed the law amending AMVETS charter to allow as members all those who served honorably and actively after May 7, 1975. AMVETS also promotes respect and honor for the Flag among its members and society at large.

Amicus Air Force Association is a non-profit membership and professional organization consisting of over 240,000 men and women, both military and civilian, active duty and retired, Reserve and Guard, devoted to promoting the national security and strength of this country, especially through a strengthened air force. Based in Arlington, Virginia, and founded by General Jimmy Doolittle, the Air Force Association also strongly supports and encourages respect and love for the Flag and the country it represents.

Amicus Allied Educational Foundation (AEF) is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education, study, and research in such diverse areas as history, law, economics, and the arts. AEF has participated as *amicus* in this Court on numerous occasions along with WLF, and supports the laws of the state and federal government prohibiting the desecration of the Flag.

Accordingly, *amici* respectfully request this Court that they be permitted to file the annexed brief which we believe will assist this Court in the disposition of this case.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION, VETERANS OF FOREIGN WARS OF THE U.S., NATIONAL FLAG FOUNDATION, AMVETS, AIR FORCE ASSOCIATION, AND THE ALLIED EDUCATIONAL FOUNDATION, IN SUPPORT OF PETITIONER.

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are set forth in the foregoing motion and are incorporated herein by reference.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case as set forth in the petitioner's brief. Nevertheless, *amici* wish to emphasize certain facts relevant to the issues discussed in this case.

The defendant, Gregory Lee Johnson, led a demonstration of protestors through downtown Dallas, Texas on August 22, 1984 during the time of the Republican National Convention in that city. The "protest" was short on speech or debate, and looked more like a roving band of vandals. The protestors marched from one office building complex to the next, banging on office windows, spray-painting walls, floors, and windows of buildings that were open, and tearing up potted plants. In front of one of the buildings, they bent a flagpole and tore from it the American flag. Johnson took the flag along with him as he led the march to the front of Dallas City Hall, shouting along the way, "Fuck you, America" while "shooting the finger," according to one police officer.

In front of City Hall, Johnson doused the flag with lighter fluid and set it ablaze with a lighter, while he and his fellow protestors chanted "America, the red, white and blue, we spit on you." The charred remains of the flag were gathered up by an observer, an employee of the United States Army Corps of Engineers, who buried them in his backyard.

After a contingent of police arrived on the scene, the demonstrators were arrested on a variety of disorderly conduct charges. Apparently, those charges against Johnson were dropped and he was instead prosecuted for violating Tex. Penal Code Ann. 42.09 which forbids the physical desecration of the flag. He was convicted of the crime and sentenced by a jury to one year in jail and asssessed a fine of $2,000. [1] His conviction was affirmed by the Court of Appeals for the Fifth District. *Johnson v. State*, 706 S.W.2d 120 (Tex. App.--Dallas 1986). With the assistance of the American Civil Liberties Union as his counsel, Johnson petitioned for review with the Texas Court of Criminal Appeals, which reversed his conviction in a 5-4 decision. *Johnson v. State*, No. 372-86 (Tex. Crim. App. Apr. 20, 1988). The court held that section 42.09(a)(3) was unconstitutionally applied to Johnson since his desecration of the flag was "symbolic speech," and that his First Amendment rights outweighed the state's asserted interests in preserving the flag as a symbol of national unity and preserving the peace. The court also held that the statute was overbroad.

SUMMARY OF THE ARGUMENT

The Texas anti-desecration statute does not regulate speech, but rather certain kinds of destructive conduct. Accordingly, such conduct is not protected by the First Amendment by merely labelling it "symbolic speech." Even if the flag desecrator's conduct is a form of speech, the state has a valid and overriding interest in preserving the integrity of the American flag as a symbol of national unity, as well as an interest in preserving

1 Johnson was not arrested for violating a similar federal law prohibiting public burning of the flag, although he certainly can be since the five-year statute of limitations has not expired. 18 U.S.C. 3282. Nor are there any double jeopardy problems since Johnson violated the law of two jurisdictions, *i.e.* Texas and the United States. *See Abbate v. United States*, 359 U.S. 187 (1959); *United States v. Patterson*, 809 F.2d 244 (5th Cir. 1987).

the peace, a breach of which is likely to be occasioned by the public burning and mutilation of our nation's flag.

The lower court failed to give sufficient weight to these important state interests, and in doing so, misapplied this Court's teachings in *United States v. O'Brien*, 391 U.S. 367 (1965) and *Spence v. Washington*, 418 U.S. 405 (1974). Accordingly, the lower court should be reversed.

ARGUMENT

I. THE TEXAS ANTI-DESECRATION STATUTE REGULATES SPECIFIC DESTRUCTIVE CONDUCT, NOT SPEECH.

Tex. Penal Code Ann. 42.09 regulates or proscribes certain kinds of destructive conduct, not speech. The law prohibits the desecration of certain specified objects, including our national flag, as well as certain places, such as graveyards and places of worship. That statute does not regulate or prohibit speech, either the written or spoken word, about those particular objects or places. *See Street v. New York*, 394 U.S. 576 (1969) (First Amendment protects contemptuous words spoken about the flag; issue as to burning of the flag not addressed). Rather, the Texas law forbids a person to perform certain physical acts, *viz.*, to "*deface, damage*, or otherwise *physically mistreat* in a way that the actor knows will seriously offend one or more persons likely to observe or discover his *action*." Section 42.09(b) (emphasis added).

There is no question that Johnson was found guilty in this case for the act of burning the flag and not for words uttered. There is also no question that witnesses to this public desecration of the flag were seriously offended, and the lower court so found. Pet. for Cert. App. 13. Accordingly, the First Amendment is not implicated at all since the statute merely proscribes certain destructive and damaging conduct, regardless of whether the desecrator intended thereby to convey any mes-

sage, political or otherwise.

The statute is thus content and viewpoint neutral with respect to any message which the actor seeks to convey. The statute would prohibit desecrating or burning the flag regardless of whether the actor intended to protest government policies, which Johnson claims he intended to do in this case, or whether it was burned by vandals who had no particular political message to convey but who merely intended to get publicity for its own sake. The statute would even prohibit a person from burning the flag for what he thought were patriotic reasons. For example, a person who thinks that Americans take their country and freedoms too much for granted might decide that by burning the flag publicly, he will be able to shock observers and stimulate feelings of patriotism and love for their flag. However, the arguably patriotic motives of the flag burner do not immunize him from prosecution under the statute.

Motive is also irrelevant with respect to other conduct prohibited by the Texas law. Thus, in addition to banning the desecration of state and national flags, the law prohibits the desecration of a "public monument" and a "place of worship or burial." Sections 42.09(1), (2). The statute makes it an offense, for example, for someone to break or topple grave markers in a cemetery at midnight when he knows that visitors to the gravesites the next day will discover the damage and be seriously offended. This conduct is prohibited whether it was a mindless act of vandalism, or whether it was intended as some kind of Satanic ritual, or a statement that the dead should be cremated instead of buried, or should not be honored at all. The same would be true in the case of a place of worship. Spraypainting one's initials on a synagogue may be mere vandalism, but spraypainting the initials "KKK" and a swastika would be prohibited by this law since such damage is done in a way likely to seriously offend those who see or discover it.

The fact that the statute defines "desecration" in terms of whether others will be "seriously offended" does not mean that the state is regulating speech rather than conduct, or is permitting a "heckler's veto," even if the conduct is considered symbolic speech. Rather, this definition reflects the common-sense notion of what "desecration" means. [2] Thus, burning a flag privately in one's own home, whether politically motivated or not, does not violate this statute. Nor does burning a worn or tattered flag in a dignified manner violate this law, because no one be would offended by such conduct, and because burning is the preferred method of disposing of worn flags. 36 U.S.C. 176(k). Similarly, no one would find it offensive if a construction worker who is remodeling a church knocked out a wall of the church to build an addition, even though the wall, and hence the place of worship, has been technically "damaged."

Accordingly, the Texas statute does not regulate speech, but rather certain destructive conduct which the state may prohibit under its well recognized police powers. But even if the actor intended not only to give serious offense by his destructive conduct, but also to convey some type of political or social message, the Texas law would not violate the desecrator's First Amendment rights because the state has a valid interest in preserving the integrity of the flag as a symbol of national unity as well as an interest in preventing breaches of the peace as will be discussed below. *Amici* will further demonstrate that the Texas law passes Constitutional muster under the Court's decisions in *United States v. O'Brien*, 391 U.S. 367 (1965) and *Spence v. Washington*, 418 U.S. 405 (1974).

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2 *See* Webster's New Collegiate Dictionary 304 (1979) which defines "desecrate" as "to treat...in a way that provokes outrage on the part of others."

II. THE STATE HAS A COMPELLING INTEREST IN PREVENTING THE DESECRATION OF OUR FLAG IN ORDER TO PRESERVE ITS PHYSICAL INTEGRITY AS A SYMBOL OF NATIONAL UNITY.

The history of the flag of the United States and its use as a symbol of national unity by its government and its people is a rich and varied one that mirrors the growth and development of our nation. [3].

Although America declared its independence on July 4, 1776, it was not until almost a year later when the Continental Congress, on June 14, 1777, formally adopted the following resolution:

> Resolved, that the flag of the United States be 13 stripes alternate red and white; that the Union be 13 stars white in a blue field, representing a new constellation.

8 Journal of the Continental Congress 464. The 13 stars and 13 stripes of the flag make up the whole flag and thus represent the unity of 13 states formed in a "new constellation." This design was undoubtedly patterned after the Grand Union Flag, first raised at Cambridge, Massachusetts on January 2, 1776, which served as our "national" flag. The Grand Union Flag consisted of the 13 red and white stripes, but the first canton of the flag contained the "Union Jack," the crosses of St. Andrew and St. George symbolizing loyalty to the Crown. While the design change from the Grand Union Flag to the Stars and Stripes may have appeared slight, "it expressed symbolically a tremendous

3 For an excellent historical description of the flag and its uses, see G. Preble, *History of the Flag of the United States of America* (1880); M. Quaife, *The Flag of the United States* (1942); J. Moss, *The Flag of the United States: Its History and Symbolism* (1933); D. Eggenberger, *Flags of the U.S.A.* (1959); W. Smith, *Flags Through the Ages and Around the World* (1975); W. Furlong, *So Proudly We Hail: The History of the United States Flag* (1981).

fact, for it advertised to the world, however belatedly, the resolve introduced in Congress by Richard Henry Lee on June 7, 1776, and formally voted by that body on July 2, 'that these United Colonies are, and of right ought to be, free and independent States.'" Quaife, *supra*, at 65.

The first legislation relating to the flag after the adoption of the constitution was the Act of January 13, 1794, 1 Stat. 341(c)1, which was similar to the original resolution of the Continental Congress except that two stars and two stripes was added to represent the addition of Vermont and Kentucky to the union. Since then, as new States were admitted to the Union, additional stars were added, although the number of stripes were reduced to the original 13 since the distinctive character of the stripes would be diluted as the stripes became thinner.

While the flag of the United States flew proudly from our ships and in wars in those early years, the citizenry did not display the flag in the ubiquitous manner familiar to us today. Nevertheless, the love for the flag as our country's symbol was strong and was best captured by Francis Scott Key, who witnessed the bombardment of Fort McHenry in Baltimore by the British during the night of September 13-14, 1814. As the "dawn's early light" appeared, it was unclear whether the fort had survived the shelling. When Key eventually saw that the flag, although damaged, was flying above the fort, he was moved to write the poem, which was put to song, entitled "The Star Spangled Banner." See Quaife, *supra*, at 112-113.

It was not until the Civil War, however, that the popularity of the flag and the national songs about the flag became widespread, for it was at that tragic point in our nation's history that the symbol of unity represented by the flag was put to its most grueling test.

"If any one attempts to haul down the American flag, shoot him on the spot," telegraphed President Buchanan's Secretary

of the Treasury John Adams Dix on January 21, 1861. Eggenberger at 136. Throughout the South, seceding states overtook federal forts, ships, arsenals, and other government property. *Id.* The States from the lower south called a convention to organize a provisional government called the Confederate States of America. One of the chief orders of business was to adopt a Flag and Seal of the Confederacy, and the famous Stars and Bars, later modified, was adopted on March 4, 1861. The Confederate Battle Flag contained 13 stars representing the Confederate States. The fall of Fort Sumter in April and the lowering of our flag was viewed as rebellion by President Lincoln and the rest of the country.

> When the stars and stripes went down at Sumter, they went up in every town and county in the loyal States. Every city, town, and village suddenly blossomed with banners. On forts and ships, from church-spires and flagstaffs, from colleges, hotels, store-fronts, and private balconies, from public edifices, everywhere the old flag was flung out, and everywhere it was hailed with enthusiasm; for its prose became poetry, and there was seen in it a sacred value which it had never before possessed.

Preble at 453. Although there were 34 stars in the flag on July 4, 1861, many proposals were made to remove the stars representing the seceded states. Lincoln rejected them all, viewing the war not as one between two nations but as an insurrection of eleven states against the national government. *Id.* at 141.

Thus, the concept of unity and nationhood became firmly associated with the flag and imbedded in the American culture. Since the Civil War, Congress and the States, and private civic, veterans, and patriotic organizations, such as *amici,* have promoted national respect and honor for the flag. On May 30, 1916, President Woodrow Wilson issued a Proclamation declaring June 14th to be Flag Day, in commemoration of the first flag resolution establishing the Stars and Stripes.

In 1949, Congress declared June 14th to be Flag Day. 36 U.S.C. 157. In 1966, the week of June 14th was declared National Flag Week. 36 U.S.C. 157a. In 1931, Congress declared The Star Spangled Banner to be our national anthem, which is universally sung at public gatherings and events. 36 U.S.C. 170. On December 11, 1987, Congress designated John Philip Sousa's "The Stars and Stripes Forever" to be the national march. Pub. Law 101-186, 101 Stat. 1286. Congress has also established The Pledge of Allegiance to the Flag and the manner of its deliverance. 36 U.S.C. 172. [4]

The flag is used to honor those who gave their lives in battle to protect it, and to mark our national achievements. As the court in *Joyce v. United States*, 454 F.2d 971 (D.C. Cir. 1971) properly noted:

> Throughout our history as a nation the flag has been our symbol in many wars, foreign and domestic. It has proud-

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4 During the recent Presidential election, the issue of the Pledge of Allegiance and respect for the flag received considerable attention, although the significance of the Pledge may have been overlooked. While Americans pledge allegiance to the flag, the British subject's allegiance is to the Queen. The Queen as the Sovereign, rather than the Union Jack, is the symbol of unity in the United Kingdom. The Union Jack and the Royal Standard are the Queen's own devices, and it is through her that the flag represents the nation. This notion traces back to the monarchies before the rise of nation states when flags did not represent a political entity, but were symbols for the monarch, lord, or ruler. Thus, while the Union Jack is generally regarded as the national flag of the United Kingdom, legally it is not so. Private citizens are forbidden to fly the Union Jack at sea and their right to so do on land is doubtful. Nevertheless, it is the *pattern* of the Union Jack that is used by the majority of private citizens. *See* D. Lister, *Some Aspects of the Law and Usage of Flags in Britain*, The Flag Bulletin (Jan.-Feb. 1978). As this commentator noted, "In contrast to the secondary status of the Union Jack, the American flag has unusual importance as the primary symbol of sovereignty and of unity....To an outsider the American attitude towards the national flag...ha[s] the appearance of being exaggerated and indeed, emotional. But so must seem the British adulation of the Queen and royal family.... Prima facie, because the United States had adopted the flag as its symbol of national sovereignty, she is fully justified in protecting that symbol from desecration by law, just as the British protect their Queen." *Id.*

> ly led our troops in battle and reverently draped the caskets of those who fell. It has signified our national presence on battleships, airplanes, school houses and army forts, and has been raised triumphantly in battle on far distant mountain peaks [the raising of the flag by the United States Marines on top of Mount Suribachi on the Island of Iwo Jima is commemorated at the Iwo Jima Memorial adjoining Arlington National Cemetery]. It was planted on the moon by the Apollo 15 astronauts....It flies over the Nation's Capitol, the Supreme Court, at all our national cemeteries throughout the world and at our Tomb of the Unknown Soldier in Arlington National Cemetery. Wherever it flies it signifies the presence of the United States of America...[and] is a shining beacon of hope.

454 F.2d at 975-76.

It cannot be disputed that the flag is a symbol of national unity whose physical integrity can be protected by the state. In 1897, South Dakota became the first state to pass a law protecting the flag from misuse by commercial or political advertising. The Supreme Court in *Halter v. Nebraska,* 205 U.S. 34 (1907) upheld Nebraska's law prohibiting a brewer from using the flag design on bottles of beer. Later in 1917, the National Conference of Commissioners of Uniform State Laws drafted a Uniform Flag Act which many states have enacted, while others, like Texas, have their own laws on the subject.

Federal legislation regulating the use of the flag was first enacted in 1905 prohibiting the registration of trademarks using the flag. 33 Stat. 725. In 1917, Congress passed a law prohibiting the flag's desecration or mutilation in the District of Columbia. 39 Stat. 900. And in 1918, Congress passed a law providing for the dismissal of government employees who, during times of war, criticize the flag in an abusive manner. 40 Stat. 554. In was not until 1968 that Congress expanded the

law prohibiting the physical mistreatment of the flag to apply outside the District of Columbia. 18 U.S.C. 700. As then Attorney General Ramsey Clark put it during Congress' consideration of this law:

> The American people are deeply devoted to their flag. It is in the hearts and minds of our citizens, the symbol of our national ideal: "liberty and justice for all." We are deeply hurt when our flag is dishonored for it represents not only a noble history and the sacrifice and spirit of our fathers, but our aspirations for our children and their fulfillment.
>
> * * * *
>
> If the Congress determines that State or local enforcement is for any reason inadequate, or that there are overriding reasons why burning the flag should be a Federal offense, the Department of Justice can, and of course will, vigorously prosecute violators.

1968-2 U.S. Code Cong. & Admin. News 2510. *See* note 1, *supra.*

Accordingly, there can be no doubt that the state of Texas has an interest in preserving the flag as a symbol of national unity by preventing its public desecration. Both the Congress and the states have enacted numerous laws promoting the display of and respect for the flag, and laws protecting the physical integrity of the flag. The American people revere and respect the flag. There are no comparable laws or reservoirs of public feeling for other national symbols, such as the national emblem, seal, or Presidential flag, as there is for the Stars and Stripes. Consequently, the flag can be considered sui generis. *See Parker v. Morgan,* 322 F. Supp. 585 (D.N.C. 1971)(three-judge court)("flags of the United States of America and the State of North Carolina [are] sui generis").

The interest in preserving the integrity of the flag as a symbol of unity not only is sufficient in and of itself to support the Texas statute, it also provides the rationale for the breach of the peace interest which the state can protect. Thus, if there is any doubt that the first interest alone can justify the Texas law, the two in combination certainly provide more than adequate support for the law.

III. THE TEXAS ANTI-DESECRATION STATUTE SERVES THE VALID PURPOSE OF PREVENTING THE BREACH OF THE PEACE.

The State of Texas has an interest in preventing any breach of the peace that might result from a violation of the anti-desecration statute. This interest outweighs any claimed First Amendment right to publicly burn the flag. *Amici* contend that it is not unreasonable for the government to anticipate that a breach of the peace might occur when the American flag is publicly destroyed. Precisely because the flag is our nation's symbol and because respect for it is widely promoted by the federal and state governments as well as by countless civic and patriotic groups such as those represented by *amici*, a breach of the peace would not be an unlikely consequence of the public desecration of the flag.

The fact that the flag burning in this case did not, fortunately, result in any particular fight or struggle in no way vitiates the State's interest in preventing one from starting. Considering the facts in this case, the protestors' conduct was, literally and figuratively, inflammatory.

The lower court and respondent improperly construed the law on the validity of "breach of the peace" statutes by seemingly requiring that an actual breach of the peace take place before the state can prevent it. This Court has never required such a Catch-22 standard in sustaining breach of the peace laws.

In the first place, the respondent was wrong when he stated that "the Texas court correctly applied the standard of *Brandenberg v. Ohio*, 395 U.S. 444 (1969), when it concluded that 'there was no breach of the peace, nor does the record reflect that the situation was potentially explosive.'" Respondent's Opp. to Pet. for Cert. at 9. The Texas court never even referred to the *Brandenberg* case, which *amici* believe is irrelevant in any event to this case. *Brandenberg* dealt solely with the constitutionality of an Ohio law that prohibited mere verbal advocacy of violent or lawless conduct. In that case, members of the Ku Klux Klan had made derogatory statements about blacks and Jews and advocated revenge during a television interview. This Court canvassed its prior opinions in this area and concluded that:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

395 U.S. at 447. The respondent is not being charged here with advocating the use of force or encouraging others to violate the law. The breach of the peace likely to be occasioned by his desecration of the flag is not that passersby will join in and desecrate the flag as well, or that they will use force as advocated and suggested by the speaker. Rather, the breach of the peace likely to be occasioned by desecrating the flag is that which may result by those who, seriously offended by the conduct, step in to protect the flag and who may likely be resisted by the protestors.

In other words, if the respondent intends his burning of the flag to be "symbolic speech," so be it. In that case, since the state can prevent the utterance of "fighting words," it can certainly prevent "fighting symbolic speech." Just as fighting

words find no protection in the First Amendment, so fighting *symbolic* speech enjoys no constitutional protection. Accordingly, the line of cases that are applicable here stems not from *Brandenberg*, but from *Chaplinsky v. City of New Hampshire*, 315 U.S. 568 (1942).

In *Chaplinsky*, a unanimous Supreme Court upheld a New Hampshire law that prohibited the utterance of "any offensive, derisive or annoying word to any other person...nor make any noise or exclamation in his presence with intent to deride, offend or annoy him...." Chaplinsky was engaged in protected First Amendment speech when he publicly criticized organized religion. However, as the crowd became unruly, a traffic officer led Mr. Chaplinsky away from the crowd, and upon approaching the City Marshal, Chaplinsky called him a "damned racketeer" and a "damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." While there was no evidence that the marshal or Chaplinsky had engaged in any physical violence or that the marshal had even been offended, the Court upheld the conviction on the grounds that the words uttered were not protected by the First Amendment. The Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words--words which *by their very utterance inflict injury* or *tend* to incite an immediate *breach of the peace*. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

315 U.S. 571-72 (footnotes cited omitted)(emphasis added). The *Chaplinsky* Court relied on these principles and concluded that the law was not unconstitutional as applied to Chaplinsky, stating that

> Argument is unnecessary to demonstrate that the appellations "damn racketeer" and "damn Fascist" are epithets *likely* to provoke the average person to retaliation, and thereby cause a breach of the peace.

Id. at 574 (emphasis added). Accordingly, this Court does not require an actual breach of the peace to have occurred before the state can pass laws to prevent conduct likely to produce a breach of the peace.

By desecrating the flag, by burning it in a public place, as well as by shouting "Fuck you, America," the demonstrators were in effect cursing passersby and destroying an object that most Americans hold dear and revere, a symbol that in fact represents them individually and collectively. A veteran who fought in combat to preserve the flag, a person whose father or husband gave his life for that flag in service to the country, or any patriotic citizen who loves his country and cherishes the freedoms the flag stands for, would likely intervene to protect the flag against destruction. To most people, an assault on the flag constitutes an assault on them as well. The fact that the crowd was restrained in this case does not deprive Texas of authority to prohibit conduct likely to undermine that restraint.

Numerous courts have held that the act of flag burning is so inherently inflammatory that the state may act to *prevent* such breaches of the peace. *See, e.g, State v, Royal,* 113 N.H. 224, 305 A.2d 676, 680 (1973); *State v. Waterman,* 190 N.W. 2d 809 (Iowa 1971); *Deeds v. State,* 474 S.W. 2d 718 (Tex. Crim. App. 1971). The court in *Monroe v. State Court of Fulton County,* 739 F.2d 568 (11th Cir. 1984) stated that "Clearly, the state has a valid interest in preventing breaches of the peace that *might*

arise from certain acts of flag desecration. *Id.* at 575 (emphasis added). That court, however, wrongly discounted that state interest in that case, even though there was an actual physical scuffle which broke out during an attempt by an onlooker to stop the desecration. The *Monroe* court incredibly dismissed the disturbance as nothing more than a "minor breach" of the peace and insufficient to overcome the flag burner's alleged First Amendment rights. *Id.* at 575.

If actual and serious violence must necessarily occur before a state has an interest in preventing it, the petitioner is correct in noting that such a standard may very well encourage a breach of the peace by those spectators who wish to stop this and future acts of flag desecration. Surely the Court can take judicial notice of past breaches of the peace occasioned by flag desecration and sustain the policy judgments made by the state to prevent such inflammatory conduct in public, without requiring that proof of ensuing violence accompany each prosecution for flag desecration. [5] If that were the standard, then the other provisions of Texas's anti-desecration statute would fall as well, since desecration of public monuments, graveyards, and churches are usually done at night without the public witnessing the act.

The lower court erroneously applied this Court's decision in *Boos v. Barry*, 108 S.Ct. 1157 (1988), in ruling that the statute was overbroad as a breach of the peace statute. In *Boos*, the Court noted the existence of a more narrowly drawn law designed to protect foreign embassy personnel than the broadly worded law under challenge. The fact that Texas has a general breach of the peace statute does not prohibit it from

5 In May 1844, a rioting mob in Kensington near Philadelphia fired upon a public gathering of citizens and a young man was killed defending the flag from desecration, an event memorialized by song and in art. *See* B. Mastai, *The Stars and the Stripes* 27 (1973); *The North American and Daily Advertiser*, May 8, 1844, at 1, col.1.

enacting other laws that define more precisely the proscribed conduct that may likely cause a breach of the peace. Texas' disorderly conduct statute relied upon by the defendant not only includes a general prohibition on offensive displays likely to incite an imminent breach of the peace, but also prohibits more specifically defined conduct such as Section 42.01(a)(10) ("display[ing] a firearm ...in a manner calculated to alarm") or Section 42.01(11) ("exposing genitals in a public place and is reckless about whether another may be present who will be offended or alarmed by his act.") Surely the state can proscribe this type of conduct. Otherwise, people who appear naked in public or engage in sex acts, and pass out literature extolling their views as to why such conduct should be allowed in public, could claim the protection of the First Amendment on the grounds that an actual breach of the peace has not occurred, or that persons offended by such conduct can simply "avert their eyes." *Cf. Cohen v. California*, 403 U.S. 15 (171). (Person wearing jacket with "Fuck the Draft" written on it in the presence of women and children inside the courthouse, is protected by First Amendment since those offended by the obscenity can "avert their eyes.")

Thus, the Texas anti-desecration statute could just as easily have been listed as an additional subsection to the disorderly conduct statute. The fact that it exists as a separate statute does not render it overbroad.

IV. THE TEXAS STATUTE COMPORTS WITH THIS COURT'S RULINGS IN *UNITED STATES v. O'BRIEN* AND *SPENCE v. WASHINGTON*, AND THEREFORE WAS NOT UNCONSTITUTIONALLY APPLIED TO JOHNSON.

The respondent claims that his desecration of the flag is protected by the First Amendment because he intended to convey his opposition to unspecified government policies, and hence, his conduct is "symbolic speech." This same argument

could be used by those who spray paint "KKK" and the swastika on synagogues in order to convey their hatred of Jews, conduct also prohibited by the Texas statute and by statute in many other states. This argument is similar to the one made by the draft card burner and rejected by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968).

In *O'Brien*, a student who publicly burned his draft registration card in protest of the Vietnam war and was convicted under a law prohibiting the destruction or mutilation of draft cards. In analyzing his "symbolic speech" claim, this Court first noted that:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

391 U.S. at 376. *Amici* contend that even assuming that burning the flag is "symbolic speech," the government has a sufficiently important interest in protection the physical integrity of our nation's symbol as discussed previously. That interest necessarily implicates the related interest of preserving the peace, which was also advanced by the State of Texas and discussed *supra*.

A. *United States v. O'Brien*

In *O'Brien*, this Court articulated its now oft-quoted four-part test to determine whether the regulation of conduct amounting to "symbolic speech" is constitutional:

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment Freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 376-77 (footnotes cited omitted).

In the first place, it should be noted that the *O'Brien* test is not a rigid one, since the Court articulated it merely in order to clarify its previous decisions in this area. The test is one that the Court itself characterized as a "clear" test, suggesting that other regulations not fully meeting this "clear" test could nevertheless pass muster. *See Smith v. Goguen*, 415 U.S. 566, 599 (1974) ("While I have some doubt that the first enunciation of a group of tests such as those established in *O'Brien* sets them in concrete for all time, it does seem to me that the Massachusetts statute [regulating flag misuse] substantially complies with those tests") (Rehnquist, J., dissenting). In any event, *amici* submit that the Texas law clearly satisfies the four-part test of *O'Brien*.

As for the first criterion, there is no question that the State of Texas has the constitutional power to promulgate the anti-desecration statute in question. While the United States flag is

a national flag, the states also have a valid interest in preventing the desecration of both the national and state flags as discussed earlier. The very nature of the United States flag at once reveals the state as well as federal interest in its preservation. The U.S. flag appears to be unique among national flags in that it is composed of symbols representing the various states: fifty stars of equal size represent the fifty states (including Texas) of the Union, and thirteen stripes--seven red, six white-- represent the original thirteen colonies and subsequent states. The flag's design and symbolism mirrors the name of the country it represents, the United States. Thus, the concept of federalism and dual federal and state sovereignty is captured in the flag's very design. The federal anti-desecration law does not preempt the states from regulating in this area; indeed, the law expressly says that the states are *not* deprived of any jurisdiction. 18 U.S.C. 700(c).

The Texas statute also satisfies the second prong of the *O'Brien* test, in that it "furthers an important or substantial government interest." The asserted interest is the need to preserve the physical integrity of the flag because it is a symbol of nationhood and national unity that is revered and respected by most citizens. Congress and the states have enacted numerous laws promoting the display of and respect for the flag. Because the flag is such a widely revered symbol, a related governmental interest is the prevention of breaches of the peace that are likely to be occasioned by public desecrations of the flag. Both of these interests have been advanced by Texas in this case and have been discussed by *amici*.

The third criterion of the *O'Brien* test, that the governmental interest be "unrelated to the suppression of free expression," is also satisfied in this case. As previously noted, the state's interest in preserving the integrity of the flag is wholly independent of the message, if any, that the desecrator intends to

convey. Whether the actor burns the flag out of hatred or love of his country is beside the point. Admittedly, the term "desecration" includes the notion that the observer would be "seriously offended," but the statute is indifferent to the type of message conveyed by the desecration. Thus, the statute applies equally to vandals, whose sole purpose is to be offensive and destructive when toppling grave stones in a cemetery, spraypainting public monuments and places of worship, or burning American flags, as well as to respondent. Respondent's message that he opposes the government--in contrast to the *manner* in which he conveyed it--might or might not have seriously offended passersby, or occasioned a breach of the peace. The statute in no way suppresses free speech. For example, Johnson was free to burn the President in effigy, or a replica of the President's flag. He could also have burned the caricature of "Uncle Sam" in effigy. He was free to verbalize his hatred for the country and its leaders as well as his disdain for the flag. The governmental interest advanced by the statute is not the suppression of a message, but the preservation of the physical integrity of the U.S. flag as a symbol of national unity.

The respondent argues, however, that this Court in *Spence v. Washington*, 418 U.S. 403 (1974) rejected the applicability of this prong to a flag misuse statute. Opposition to Pet. for Cert. at 8. In *Spence*, this Court reversed the conviction of a student who had displayed the American flag upside down from his window with a peace symbol taped over the flag. The defendant was convicted for violating Washington's "improper use" statute rather than its flag desecration statute, and this Court specifically noted that the defendant did not "physically disfigure the flag or destroy it." *Id.* at 415. It was in this context that the Court assessed the State of Washington's interest in preserving the flag as a symbol of national unity under the third-prong of the *O'Brien* test, *i.e.*, that the governmental interest be unrelated to the suppression of free expression:

> If this interest is valid, we note that it is directly related to expression *in the context of activity like that undertaken by appellant*. For that reason and *because no other governmental interest unrelated to expression has been advanced* or supported on this record, the four-step analysis of *United States v. O'Brien* ... is inapplicable.

418 U.S. at 414, n.8 (citation omitted) (emphasis added).

Thus, this Court did not foreclose the applicability of *O'Brien* to cases such as the one at bar. In the first place, both the conduct and the statute in this case are, as noted above, different from the conduct and the statute involved in *Spence*. In addition, the *Spence* Court may have mistakenly characterized the third-prong of the *O'Brien*, test by stating that Washington's improper use statute was "directly related to expression." The Court in *O'Brien*, however, formulated the test in terms of whether the state interest is "unrelated to the *suppression* of free expression." *O'Brien, supra* at 377. (emphasis added). The Texas statute does not suppress speech, but merely proscribes certain conduct regardless of the views of the actor. If the test in *O'Brien* was merely whether the proscribed conduct involved "expression" or speech, then even the statute in *O'Brien* prohibiting the burning of draft registration cards would not pass the test since the government asserted that certain information or messages contained on the draft card must not be destroyed. O'Brien objected to these messages and wanted to destroy the card to symbolize or express his political opposition to the message the card conveyed. In the same way, the flag contains messages, although in symbols rather than in words. In both this case and *O'Brien*, the government had an interest in preserving the physical integrity of the document or symbol, and had no desire to suppress speech *about* those documents or symbols. Otherwise, O'Brien could easily have avoided prosecution by simply producing from his wallet a photocopy of his draft card containing the identical information from the original that he

burned.

In any event, the Court in *Spence* further noted that there was "no other interest unrelated to expression" that was advanced in that case. 418 U.S. at 414, n.8. In the instant case, however, Texas has argued that it also has an interest in preserving the peace. That interest also is a valid one, and therefore the statute satisfies the third prong of the *O'Brien* test.

The Texas statute satisfies the fourth and last prong of the *O'Brien* test, namely, that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest at stake. The state interest is the preservation of the physical integrity of the flag, and the Texas statute is narrowly drawn to satisfy that interest. As previously noted, there is no restriction on any verbal or written expression about the flag. The protestors are free to carry the flag and use it as a backdrop for their rally; what they cannot do is to use it as a canvas upon which to spraypaint epithets, as a target upon which to throw eggs or mud, or as an object to be burned and destroyed by fire. They are free to assault and destroy any symbol of government or of our leaders except the flag. They can even burn and mutilate the flag in private and invite like-minded friends to their house to witness the spectacle.

Accordingly, *amici* submit that the Texas statute satisfies the *O'Brien* criteria and is therefore not an unconstitutional abridgement of a flag burner's First Amendment rights. [6]

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6 *Amici* note that the *O'Brien* argument was advanced by the United States in its Opposition to the Petition for a Writ of Certiorari in *Kime v. United States*, 673 F.2d 1318 (4th Cir. 1982), *cert. denied*, 459 U.S. 949 (1982) in defending the validity of a conviction of a politically-motivated flag burner under the federal statute. That statute, unlike the Texas statute, forbids "casting contempt" on the flag by mutilating or burning it. 18 U.S.C. 700. Thus, if the *O'Brien* test is applicable to the federal statute, *a fortiori* it is applicable to the Texas statute.

B. *Spence v. Washington*

Johnson's attempt to liken his case to *Spence v. Washington*, 418 U.S. 403 (1974) is unavailing. In *Spence*, the Court ruled that the Washington "improper use" statute was unconstitutionally applied to a protestor who was convicted of placing on the flag a peace symbol fashioned from black removable tape and then displaying it from his apartment window. In so ruling, the Court noted that a "number of factors [had been] *important*" to the disposition of the case. 418 U.S. 405, 409 (1974) (emphasis added). *Amici* will discuss and analyze each of these factors to demonstrate their inapplicability to this case.

The *Spence* Court initially considered the ownership of the flag in question:

> First, this was a privately owned flag. In a technical sense it was not the property of the government. We have no doubt that the State or National Government may forbid anyone from mishandling in any manner a flag that is public property.

Id. In the instant case, the flag was apparently not owned by the government, but neither was it owned by Johnson. He and his fellow demonstrators had stolen it from the flagpole in front of the Mercantile National Bank building. *See* Petition for Cert. at 7-8. Presumably, it belonged to the bank and was put there by its owner to be displayed in a dignified manner and to convey its message of national unity. Accordingly, by taking the flag away from its owner and interrupting the message sought to be conveyed by its display, Johnson and his demonstrators exercised a "heckler's veto" of the message being conveyed, and can be punished for doing so. *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1504-05 (1975).

Even if the flag had been owned by Johnson, *amici* submit that the state can nevertheless regulate its use by prohibiting its desecration. The flag exists as an entity only because Congress has authorized its creation. It is a symbol of nationhood and national unity, and the state has an interest in preserving the physical integrity of that symbol. In effect, one buys the flag with the understanding that one will comply with the laws prohibiting its desecration. This situation is analogous to that in *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114 (1981) where this Court ruled that although mailboxes are purchased and owned privately, the government can regulate its use and prohibit unstamped letters, albeit communication protected by the First Amendment, from being deposited therein. Another example is Congress' assignment of the exclusive use of the word "Olympics" to the United States Olympic Committee, and the authority to prohibit other groups from appropriating that symbol. See *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S.Ct. 2971 (1987). If Congress or the State can declare that certain private property is historic and must be preserved, it can punish the owner for destroying that property. So too can the state declare that the flag, even if technically private property, cannot be publicly destroyed. Certainly, this is not a "taking" of private property under the Fifth Amendment entitling the flag desecrator to compensation.

As Justice Fortas noted in *Street v. New York*, 394 U.S. 576 (1974), "the flag is a special kind of personalty," a form of property "burdened with peculiar obligations and restrictions." *Id.* at 616, 617 (dissenting opinion). And as Justice White noted, "the flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it." *Smith v. Goguen*, 415 U.S. 566, 587 (concurring in judgment). Justice Rehnquist agreed with these observations in his dissent in *Spence*, 418 U.S. at 422.

Thus, the fact that the flag may be owned by the desecrator does not give him unlimited power to destroy it, anymore than the fact that a person who has purchased the tombstone for a departed but despised relative allows him to desecrate the marker and violate section 42.09(2) with impunity.

The next factor considered by the Court in *Spence* was the place of the display:

> Second, [Spence] displayed his flag on private property. He engaged in no trespass or disorderly conduct. Nor is this a case that might be analyzed in terms of reasonable time, place, or manner restraints on access to a public area.

418 U.S. at 409. In the case at bar, Johnson did not merely "display" an altered flag, but stole the flag, burned it on public property, trespassed upon and destroyed other private property, shouted obscenities, spat on the flag, and otherwise engaged in disorderly conduct. In this respect, *amici* submit that the Texas statute can also be viewed as a reasonable time, place, or manner restraint on access to a public area. The statute allows a person to demonstrate in any way he pleases on public property so long as he does not physically desecrate the flag. As noted earlier, there are ample alternatives for the expression of one's hostility or hatred for his country or leaders. Such a rule leaves plenty of breathing room for the exercise of First Amendment rights.

The third factor discussed in *Spence* was the risk of the breach of the peace:

> Third, the record is devoid of proof of any risk of breach of the peace. It was not [Spence's] purpose to incite violence or even stimulate a public demonstration. There is no evidence that any crowd gathered or that [Spence] made any effort to attract attention beyond hanging the flag out of his own window.

Id. In the instant case, the context in which Johnson burned the flag clearly indicates that there was evidence of risk of breach of peace. Besides going on a rampage of vandalism, Spence intended to draw public attention to his conduct, especially for the benefit of the television cameras on the scene. The burning of the flag seriously offended certain onlookers, and an initially passive observer might well have been moved to physically defend the flag from its wanton destruction. Accordingly, Johnson's conduct was totally unlike that of Spence who merely displayed an altered flag and neither drew the public's attention to it nor even appeared next to it.

> Finally, the *Spence* Court found it significant that: the State conceded, as did the Washington Supreme Court, that [Spence] engaged in a form of communication.
>
> * * * *
>
> [T]his was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by [Spence] about the then-current domestic and foreign affairs of his government.

Id. at 410-11. In the instant case, the State of Texas explicitly denies that Johnson engaged in a form of communication. *Amici* submit that the acts of vandalism, breaking windows, spraypainting buildings, shouting obscenities, spitting, and burning of the flag by Johnson and his cohorts, was precisely the type of "mindless nihilism" that this Court found lacking in *Spence*. There is absolutely nothing in the record to show that Johnson intended to engage in debate or discuss anything; his sole intent was to exhibit outrageous conduct.

In addition, the *Spence* Court noted that the attorney for the State of Washington disclaimed any legitimate state interest in promoting respect for the flag. 418 U.S. at 412. *Amici* submit that such an interest is indeed a valid one and one which has been amply advanced at the state and national levels as pre-

viously noted in this brief. In this case, Texas has always maintained a state interest in the preservation of the nation's flag as a symbol of unity.

Nevertheless, the *Spence* Court assumed, for purposes of its decision, that the state has an interest in preserving the physical integrity of the flag. Yet the Court, in a per curiam opinion (with Justices White, Rehnquist, and Chief Justice Burger dissenting), found the "improper use" statute unconstitutional as applied in this case only, noting that Spence had not been charged with violating the separate flag desecration statute, and that he did not "permanently disfigure the flag or destroy it." *Id.*

There can be no doubt that the Texas statute has not been unconstitutionally applied to the flag burner in this case under the test set forth in *O'Brien v. United States* or in light of the factors considered "important" by the Court in *Spence v. Washington.*

In striking down the Texas anti-desecration statute, the lower court and other courts have misapplied other decisions of this Court in erroneously concluding that the state's interest in preserving the flag as a symbol of national unity does not sufficiently outweigh whatever First Amendment rights are possessed by a flag desecrator. In *West Virginia State Board of Ed. v. Barnette,* 319 U.S. 624 (1943), the Court held that the flag salute was symbolic speech and that the state could not compel an individual to salute the flag to promote national unity.[7] However, there is a qualitative and significant difference between compelling someone to affirmatively salute the flag and show outward signs of respect, and prohibiting someone from

7 However, while a state cannot expel a student for refusing to recite the pledge, it should be noted that the state can compel a teacher to lead her class in the pledge as part of the state's interest in promoting civic pride and respect. *See Palmer v. Board of Education of the City of Chicago,* 603 F.2d 1271 (4th Cir. 1979), *cert. denied,* 444 U.S. 1026 (1980).

mutilating or destroying it. The respondent and others of his ilk are free to refuse to show any affirmative or outward sign of respect for the flag. The lower court failed to appreciate this difference, as did the court in *Monroe v. State Court of Fulton County,* 739 F.2d at 574 (11th Cir. 1984).

References to other decisions dealing with flag or symbolic display are also inapposite. In *Stromberg v. California,* 283 U.S. 359 (1931), for example, the defendant was convicted for displaying a plain red flag symbolizing anarchy. This Court overturned the conviction for violating a California law prohibiting displaying such symbols, declaring the law unconstitutional on its face. *Id.* at 369. The Court in *Stromberg* was not faced with a case such as this one, involving the destruction or mutilation of the American flag. The red flag was a symbol chosen by the "speaker" to be displayed to represent his views, just as the black armbands worn by the students in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969) were symbols chosen to represent their views. Neither of these symbols represent national unity or can be said to be revered or honored by the American people.

CONCLUSION

For all the foregoing reasons, *amici* urge this Court to reverse the decision below and to uphold the defendant's conviction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF TEXAS, *Petitioner*,

—v.—

GREGORY LEE JOHNSON, *Respondent*.

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

BRIEF OF THE CHRISTIC INSTITUTE, CLERGY AND LAITY CONCERNED, THE COMMITTEE OF INTERNS AND RESIDENTS, THE COMMUNITY FOR CREATIVE NON-VIOLENCE, THE FELLOWSHIP OF RECONCILIATION, LA RAZA LAWYERS' ASSOCIATION OF SAN FRANCISCO, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., THE LAWYERS' COMMITTEE ON NUCLEAR POLICY, THE MASSACHUSETTS CHAPTER OF THE NATIONAL LAWYERS GUILD, THE NATION INSTITUTE OF NEW YORK CITY, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, THE NATIONAL LAWYERS GUILD, THE NATIONAL ORGANIZATION FOR WOMEN, INC., THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, PEOPLE FOR THE AMERICAN WAY, TOWARD A MORE PERFECT UNION, THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, WABUN-ININI, ANISHINABE (A/K/A VERNON BELLECOURT), AS A REPRESENTATIVE OF THE AMERICAN INDIAN MOVEMENT, THE WAR RESISTERS LEAGUE, AND THE WRITERS GUILD OF AMERICA, EAST, INC. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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G.H. Preble, *Origin and History of the American Flag* (1917) 17

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STATEMENT OF INTEREST

This brief is submitted on behalf of twenty-one *amici curiae* which include religious and anti-war organizations, labor unions and guilds, women's and minority advocacy organizations, progressive political and civil rights groups, political education and public policy associations, lawyers' committees and public interest law groups, a community-based activist center and an individual representative of the American Indian Movement. They have a combined membership of over half a million Americans.

Amici have a special interest in the subject matter and outcome of this case. Each is dedicated to achieving progressive social ends through organized political, legal and/or educational activity. In pursuing such ends, each relies upon the constitutional guarantee of free expression to ensure that its voice be heard and each is committed to the principle that dissenting political views must be permitted expression.

Many of the *amici* regularly engage in political expression that is symbolic in form, or in which conduct and speech are intertwined. All believe that symbolic speech is an important and proper medium for expressing messages of political and social significance. The American flag, as the leading symbol of our government, is a particularly potent medium for communicating opposition to government policies.

This case raises significant issues of law concerning the scope of constitutional protection of all symbolic protest. Were the decision below to be reversed, *amici* believe their efforts to effect progressive social changes through the exercise of free speech would be seriously impaired.

This brief is filed pursuant to Rule 36.2 of the Rules of the Court. The parties have consented to its submission in letters on file with the Clerk of the Court. Descriptions of the individual *amici* are set forth in Appendix A of this brief.

SUMMARY OF ARGUMENT

This case requires the Court to decide whether the State of Texas may punish Gregory Lee Johnson for expressing his political views by publicly burning an American flag. The Texas Court of Criminal Appeals held that the State could not do so consistent with the First Amendment. This Court should affirm.

Desecration of our nation's cherished symbol has profound emotional resonance. Most Americans recoil at the message communicated by an act of flag desecration. That understandable reaction must not obscure a clear constitutional analysis of this case. The Texas statute simply ignores this Court's historic protection of the flag's use as an important symbol of political protest, *see Spence v. Washington*, 418 U.S. 405 (1974) (per curiam); *Street v. New York*, 394 U.S. 576 (1969); *Board of Educ. v. Barnette*, 319 U.S. 624 (1943); *Stromberg v. California*, 283 U.S. 359 (1931), and deprives dissenters of a highly effective means of communication.

The burning of an American flag during a political demonstration plainly is symbolic speech entitled to First Amendment protection. Furthermore, the regulation at issue here focuses, both implicitly and by its very terms, on the communicative content and effect of a flag desecration on observers. By prohibiting abuse of a symbol that carries strong patriotic connotations, Texas protects "acceptable" uses of the flag's symbolism while restricting its contrary use to express disaffection with our government. Moreover, this statute forbids only those desecrations that would "seriously offend" third parties. The regulation is thus directly rather than incidentally speech-suppressive, and so cannot satisfy the test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968).

Because it is speech-suppressive, the Texas statute must be subjected to this Court's most exacting scrutiny. Such a law is invalidated unless the government makes the exceptional showing that it is the most narrowly tailored means of furthering a compelling state interest, or that it proscribes a category of speech that is unprotected by the First Amendment.

Texas has made no such showing. Neither of the justifications advanced by the State—protecting the flag as a symbol of "national unity" and preventing breaches of the peace that might occur as a result of a flag desecration—warrants withdrawal of the First Amendment's protection of political expression. These interests are merely a subterfuge to effect the sort of state-enforced obeisance to the flag that this Court has, on a number of occasions during the past fifty years, held to violate the First Amendment.

To reinstate Gregory Johnson's conviction and sentence of imprisonment would signal a dangerous reorientation in the relationship of state and citizen. If Johnson's communicative conduct may be suppressed in the name of privileged symbolism and public order, what principle would limit even wider suppression justified by similar governmental interests? May Texas punish the next dissenter who shreds a paper flag or profanes our national anthem to express dismay at U.S. inaction against apartheid? Or prosecute another who, in opposition to a new U.S.-Soviet missile treaty, hangs our President in effigy? Such attempts to enforce a love of country by outlawing symbolic expressions of protest are as unproductive as they are unconstitutional. Under settled First Amendment principles, *amici* submit that the decision below should be upheld.

ARGUMENT

I. JOHNSON'S POLITICALLY INSPIRED BURNING OF AN AMERICAN FLAG AT A PUBLIC DEMONSTRATION CONSTITUTES SYMBOLIC SPEECH ENTITLED TO FIRST AMENDMENT PROTECTION.

Gregory Johnson was prosecuted and convicted for burning an American flag at a public assembly convened to protest policies of the United States Government.[1] This activity was sym-

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1 *Amici* note that there remains some question as to whether Johnson himself set fire to the flag during the Dallas protest, or was simply present when the desecration occurred. References to Johnson's burning of the flag are made with this ambiguity in mind.

bolic speech within the ambit of the First Amendment. Analysis of the case must proceed on this basis.

A. Johnson's Activity Readily Conveyed a Particularized Message That Was Likely to Be Understood by Onlookers.

Johnson and others attending the Dallas rally spoke through words as well as actions. Even taking Johnson's actions alone, however, it is settled law that the freedom of speech is "not confined to verbal expression." *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (plurality) (silent sit-in). This Court has long recognized that First Amendment protection must be accorded to non-verbal activity when it is "sufficiently imbued with elements of communication." *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam) (display of peace symbol affixed to American flag). *See also Stromberg v. California*, 283 U.S. 359, 368-69 (1931) (display of red flag); *Tinker v. Des Moines School District*, 393 U.S. 503, 505-06 (1969) (wearing of black armband in protest is "closely akin" to "pure speech" and so "is entitled to comprehensive protection under the First Amendment").

Johnson's conduct easily satisfies this constitutional standard. Johnson burned the flag at a public assembly held in front of the Dallas City Hall (R.III-355, II-162), a standard forum for communications of a political nature. The demonstration, entitled the "Republican War Chest Tour", was convened while the Republican National Convention was taking place in Dallas and was preceded by a march in which the participants, including Johnson, distributed political leaflets and chanted political slogans critical of the United States and its conduct of foreign policy. (R.II-71-72, V-833-34). At the culmination of the rally, Johnson participated in burning the flag while the assembled continued to chant messages of political protest. (R.III-355; II-162). Observers of the demonstration and the flagburning testified at trial that they understood that

Johnson was conveying a political message by his action. (R.III-380-90, II-160).[2]

Here, no less than in *Spence*, "it would have been difficult for the great majority of citizens to miss the drift of [Johnson's] point at the time that he made it." 418 U.S. at 410. As both the majority and the dissent in the Texas Court of Criminal Appeals found below, Johnson's action met the Court's symbolic speech test: in burning the flag, he "intended to convey a particularized message . . . and . . . this message was very likely to be understood by those who viewed it." Pet. App. 8-10 (majority opinion) (quoting *Johnson v. State*, 706 S.W.2d 120, 123 (Tex. App. 1988) (Vance, J.)); *see also* Pet. App. 25 (dissenting opinion). These events permit no other conclusion than that Johnson was, in burning the flag, engaged in an act of protected symbolic speech and was prosecuted by the State of Texas because of his "expression of an idea through activity." *Spence v. Washington*, 418 U.S. at 411.

B. Flag Destruction Is a Form of Expression of Political Dissent Falling Squarely Within the First Amendment Guarantee of Freedom of Speech.

No doubt, the message conveyed by Johnson's act of flagburning was both powerful and unpopular. Most Americans, believing in the greatness of this nation and the democratic foundations which sustain it, find Johnson's message as well as his medium deplorable. But the theory of our democracy requires that we tolerate dissent. Those who founded this nation "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

For that reason, the guarantee of freedom of expression protects messages no matter how controversial in content or radical in point of view. The First Amendment's sweep is not "limited

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2 At his trial, Johnson explained that "[t]he American Flag was burned as Ronald Reagan was being renominated as President . . . . [A] more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time." (R.V-656).

to things that do not matter much . . . . The test of its substance is the right to differ as to things that touch the heart of the existing order." *Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Nor does the First Amendment shrink from protecting communications of a political nature on grounds that they are cast in form offensive to many. *See Cohen v. California*, 403 U.S. 15, 22-23 (1971); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (freedom of speech embraces communication that "stirs the public to anger," because a "function of free speech under our system of government is to invite dispute"). As the Court most recently stated in *Boos v. Barry*, 485 U.S. ____, 108 S. Ct. 1157 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. ____, 108 S. Ct. 876, 882 (1988)), "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.' " *Id.*, at 1164.

Applying these basic principles, the Court has accorded First Amendment protection to unpopular and highly emotive expressions of political dissent, whether conveyed by symbol or spoken word. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1 (reversing convictions of speaker who aroused anger by race baiting); *Tinker v. Des Moines School District*, 393 U.S. 503 (protecting symbolic opposition to the war in Vietnam expressed by the wearing of a black armband); *Brandenberg v. Ohio*, 395 U.S. 444 (1969) (striking down on its face, and as applied to virulent racist verbal and symbolic speech, statute prohibiting advocacy of use of force and violations of law); *Cohen v. California*, 403 U.S. 15 (shielding vulgar anti-draft epithet emblazoned on back of jacket).

First Amendment protection is no less applicable to expressions of dissent conveyed by, or about, a flag, even in the charged setting when "the flag involved is our own." *Board of Educ. v. Barnette*, 319 U.S. at 641. This Court "for decades has recognized the communicative connotations of the use of flags," *Spence*, 418 U.S. at 410, and at least one Justice has observed the place of the American flag as "an integral part of public protests." *Street v. New York*, 394 U.S. 576, 604 (1969) (Warren, C.J., dissenting). The fact that a flag, when observed,

immediately connotes "some system, idea, institution, or personality" makes it a highly effective vehicle of communication—the flag functions as a powerful "shortcut from mind to mind." *Barnette*, 319 U.S. at 632.[3] Indeed, it is precisely the power of our flag as a symbol of pride in America that inspires the sort of reactive expression Johnson engaged in here.

In view of the formidable communicative powers of flags, the Court has not hesitated to extend First Amendment protection to the flying of a red flag as a gesture in support of communism, *Stromberg v. California*, 283 U.S. 359, the speaking of defiant words about our flag in protest of the racially motivated murder of a civil rights leader, *Street v. New York*, 394 U.S. 576, and to the display of a defaced American flag in opposition to the invasion of Cambodia, *Spence v. Washington*, 418 U.S. 405.

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3 This feature of flags (and other forms of symbolic expression) is particularly important to those seeking to convey unpopular messages. It is now well appreciated that the form in which a communication is couched may have as great an impact upon its efficacy as does the communication's content. M. McLuhan, *Understanding Media* 7-21 (1964). Unpopular messages which might otherwise be wholly disregarded by the public if confined by law to expression by speech or written word may, if conveyed by symbol, draw greater audience interest and attention. *See* Note, *First Amendment Protection of Ambiguous Conduct*, 84 Colum. L. Rev. 467, 471 (1988). This was a matter of no small importance to Johnson, given that mass media seldom pay much attention to politically unorthodox ideas. *See* Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1647 (1967).

As Johnson's conduct also demonstrates, symbols like flags not only may attract attention to unpopular messages but also can contribute emotional content to them "beyond the capabilities of language." Note, *Symbolic Conduct*, 68 Colum. L. Rev. 1091, 1108-09 (1968); *see also* W. Smith, *Flags Across the World* 5 (1980) ("National flags in particular stimulate the viewer to feel and act in a calculated way . . . They are employed to honor and dishonor, warn and encourage, threaten and promise, exalt and condemn, commemorate and deny. . . . Flags authenticate claims [and] dramatize political demands."). For these reasons, Johnson's choice of communicative form must be protected for it is an instance "in which the content or effectiveness of the message depends in some measure upon how it is conveyed." *Young v. American Mini Theatres*, 427 U.S. 50, 78 (1976) (Powell, J., concurring).

This consistent line of authority must control here. Johnson's act of flagburning was a " 'primitive but effective way of communicating ideas.' " *Spence*, 418 U.S. at 410 (quoting *Barnette*, 319 U.S. at 632). The First Amendment embraces Johnson's clear expression of political dissent.

II. THE TEXAS FLAG-DESECRATION STATUTE IS DIRECTED AT SUPPRESSING COMMUNICATION.

Indifferent to this Court's command that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . ," *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972), Texas prohibits the destruction of an American flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover" the desecration. Tex. Penal Code Ann. § 42.09(a)(3) (Vernon 1974). The Texas law's isolation of offensive communications all too clearly reveals its suppressive focus, which is in fact a feature of all flag-desecration statutes.

Where, as in this case, the government seeks to regulate expressive conduct, constitutional analysis of the regulation begins with application of the four-part test announced in *United States v. O'Brien*, 391 U.S. 367 (1968):

> [A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression*; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377 (emphasis added). When a law satisfies each aspect of the *O'Brien* calculus, it is not analyzed as a primary abridgement of expression and thus need not meet the otherwise stringent requirements imposed by the First Amendment as a precondition to such abridgements. However, as *amici* demonstrate in this section of the brief, flag statutes like Texas' are intimately "related to the suppression of free expression."

Therefore, *O'Brien*'s leniency is inapposite and the traditional First Amendment scrutiny applied to speech-suppressive measures governs.

Texas not surprisingly disclaims any speech-suppressive aim. The State maintains that its law forbidding destruction of flags serves two state interests unrelated to the suppression of expression: (1) protecting the flag as a symbol of national unity and (2) preventing breaches of the peace. *Amici* here demonstrate why these claimed state interests must, under this Court's decisions, be viewed as directly speech-suppressive. In Section III, *infra*, *amici* demonstrate why, in light of section 42.09's impermissible focus, the statute must be invalidated.

A. Flag-Desecration Statutes Necessarily Are Aimed at the Suppression of the Message Communicated by the Act of Desecration.

1. The State's Assertion That the Statute Protects the Flag As a Symbol of National Unity Underscores the Speech-Suppressive Nature of the Statute.

The first of Texas' two justifications for the proscription of flag desecration is the preservation of the flag as a "symbol of national unity." Texas claims that this interest is unrelated to the suppression of speech in that it applies without regard to the specific viewpoint conveyed by an act of desecration. Such an assertion misunderstands this Court's test for "content-relatedness" and ignores the most pertinent line of this Court's prior holdings.

a. *Street* and *Spence* Hold That a State's Interest in Protecting the Flag's Symbolic Value Is Speech-Suppressive.

In *Street v. New York*, 394 U.S. 576, the Court assessed a state's interest in preserving the symbolic values embodied by the flag and held that this interest could not outweigh the countervailing First Amendment interests of those who would deprecate the flag as a form of political expression. Drawing upon this Court's landmark decision in *Board of Educ. v. Barnette*,

319 U.S. 624, in which a statute requiring schoolchildren to salute the flag was struck down as violative of their right of free expression, the *Street* Court reasoned that a government prohibition on criticism of the flag in the name of protecting its symbolic value was tantamount to requiring adherence to a homogenous set of political and intellectual values. *Street*, 394 U.S. at 593.

While Texas strives to distinguish *Street* from the instant case on the ground that *Street* involved verbal rather than symbolic contempt for the flag, the State provides no principled justification for why this verbal/nonverbal distinction would have any relevance to the speech-suppressive nature of an anti-desecration law. The reasoning of *Street* applies with equal force to any form of expressing contempt, so long as the expression falls within the protective ambit of the First Amendment. Whether one uses opprobrious words towards the flag or desecrates the flag in protest, the nature of a state's interest in the flag as a symbol of the nation remains static. In either case, that interest is tied to the suppression of expression. Texas has failed to make any showing to the contrary.

Indeed, in *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (1983) (en banc), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), Justice Scalia (then a Circuit Judge), made short shrift of the speech/conduct distinction now being advanced by the State of Texas to distinguish the present case from *Street*. As explained in his dissenting opinion, the speech/conduct dichotomy is simply irrelevant once the government's proscription of expressive conduct has been shown to be aimed at communicative effect: "A law *directed* at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." *Id.* at 622 (Scalia, J., dissenting) (emphasis in original). If, therefore, the state's interest in the flag as a symbol is, as the Court held in *Street*, aimed at the suppression of speech when it is used to justify prohibiting verbal assaults on the flag, there can be no separate rule regarding the identical state interest when it is used to justify prohibitions on nonverbal symbolic speech. The showing that must be made by the state to justify the prohibition is the same.

Five years after its decision in *Street*, the Court, in *Spence v. Washington*, 418 U.S. 405, once again squarely faced the question of a state's interest in the flag's symbolic value. *Spence* involved symbolic and not verbal expression. Yet again the Court struck down application of the challenged statute after unambiguously characterizing this state interest as being "directly related to expression." *Id.* at 414 & n.8.[4]

If the State of Washington's interest in preserving the national flag as an "unalloyed symbol of our country" was construed by this Court over a decade ago as being aimed at the suppression of expression, *Spence*, 418 U.S. at 412-14, so too must Texas' interest in preserving the flag "as a symbol of nationhood and national unity." There is no principled way to distinguish the two cases. Although Texas seeks to exploit the superficial differences between the respective ways in which Spence and Johnson chose to express themselves (the former by defacing the flag, the latter by burning it), the State's interest in the flag's symbolic value and the recognized relationship of this value to the suppression of expression are unaffected by the communicator's method of flag desecration.

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4 The *Spence* Court's analysis continued:

> For that reason and because no other governmental interest unrelated to expression has been advanced or can be supported on this record, the four-step analysis of *United States v. O'Brien*, 391 U.S. 367, 377 (1968), is inapplicable.

418 U.S. at 414 n.8.

As Justice Brennan has pointed out, the holdings of *Street* and *Spence* should not be surprising:

> [T]he Government has no esthetic or property interest in protecting a mere aggregation of stripes and stars for its own sake; the only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol. Thus, assuming that there is a legitimate interest at stake, it can hardly be said to be one divorced from political expression.

Kime v. United States, 459 U.S. 949, 953 (1982) *denying cert. to* 673 F.2d 1318 (1982) (Brennan, J., dissenting).

b. This Court's Recent Decisions Require That a State Interest in Protecting the Flag as Symbol Be Regarded as Speech-Suppressive Even if That Symbol Is Deemed Ideologically Neutral.

Street and *Spence* thus compel the conclusion that Texas' interest in the flag as a symbol of nationhood is one that aims at expression. However, even had those cases never arisen, the same conclusion follows from application of this Court's settled approach to determining whether a law is directed at suppression of expression, or only incidentally impairs it.

A state's interest must be regarded as content-based if the harm to that interest which the law in question seeks to avert arises as a consequence of the communicative content or impact of expression. *See Boos v. Barry*, 485 U.S. ____, 108 S. Ct. 1157, 1163-64 (1988); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977); L. Tribe, *American Constitutional Law* § 12-3 at 794-804 (2d ed. 1988).[5] Only when

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5 As Justice Scalia has pointed out, specifically with reference to symbolic speech:

> Every proscription of expressive conduct struck down by the Supreme Court was aimed precisely at the communicative effect of the conduct. The only reason to ban the flying of a red flag (*Stromberg*) was the revolutionary sentiment that symbol expressed. The only reason for applying the "breach of the peace" statute to the silent presence of black protestors in the library in *Brown* was the effect which the communicative content of that presence had upon onlookers. The only reason for singling out black armbands for a dress proscription (*Tinker*) was precisely their expressive content, allegedly causing classroom disruption. The only reason to prevent the attachment of symbols to the United States flag (*Spence*) was related to the communicative content of the flag.

Community for Creative Non-Violence, 703 F.2d at 624-25 (Scalia, J., dissenting) (footnotes omitted).

Professor Ely has similarly cast the critical inquiry as:

> whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatsoever.

Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1497 (1975).

the justification in question is divorced from the communicative impact of the expressive conduct does an interest qualify as "content-neutral" or "unrelated" to suppression of speech.[6]

Texas' interest in preserving the flag as a symbol of nationhood must be held to be related to suppression of expression under the Court's settled approach. The harm to that interest which section 42.09 and similar flag-desecration statutes seek to avert—the weakening of the flag as a symbol of nationhood caused by acts of flag destruction—arises (if at all) *only* because such acts of flag destruction are understood to communicate.

This communicative focus of typical flag-desecration statutes is evident from their differential treatment of private and public desecrations. A state's interest in the flag as a symbol of "national unity" is only implicated when the flag is burned *publicly*. Professor Tribe underscores this point by asking "whether the national symbol, which the government seeks to preserve unsullied, would be corrupted or interfered with in any way by 'closet' flag burnings—people drawing their own flags on flammable fabric and igniting them . . . in the privacy of their homes." L. Tribe, *supra* p. 12, § 12-3, at 801-02. The answer to the question is obviously no; degradation of the symbol occurs, if at all, only to the degree that the message is communicated to third parties. The state's interest, therefore, plainly is related to suppressing speech.

Texas' counter-argument—that the flag-as-symbol interest is unrelated to speech suppression because it is advanced in an

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6 An example might be a statute that proscribes the use of sound trucks after 9 o'clock p.m. as a public nuisance. Such a regulation is not aimed at the suppression of speech because the harm sought to be avoided—late-night noise—is not a function of a message's communicative impact but, rather, the noise pollution that is an incidental, non-communicative by-product of any message (or of plain static from the microphone). *Cf. Kovacs v. Cooper*, 336 U.S. 77 (1949). Similarly, the interest of the government in the smooth administration of the draft, advanced to justify a rule prohibiting the burning of draft cards, was held by this Court to be unrelated to the suppression of expression because the harm sought to be avoided—an inefficient draft—arose from noncommunicative consequences of destroying draft cards and not from the anti-draft message thereby conveyed. *United States v. O'Brien*, 391 U.S. at 381-82.

ideologically neutral manner—is unavailing. For even if section 42.09 or any other flag statute could be considered "viewpoint neutral" in the sense that it forbids offensive destruction of flags regardless of the discrete message sought to be conveyed by a particular flag desecrator, it is nevertheless "content-based" in that the State's justification for suppression relies precisely upon the fact that acts of flag destruction, because they communicate, impair the flag's status as a symbol of national unity.[7]

In challenging this principle, Texas seeks to reargue the very issue resolved last term in *Boos v. Barry*, 108 S. Ct. 1157. There the Court struck down a District of Columbia statute making it unlawful to "display . . . any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.' " *Id.* at 1160. The government argued that the provision was intended to protect the dignity of foreign diplomatic personnel, and did so in a content-neutral manner because the law forbade all signs containing critical messages regardless of ideological bent. *Id.* at 1162-63. The *Boos* Court held that, notwithstanding its ideological neutrality, that statute "must be considered content-based" because the justification for the law "focuse[d] *only* on the content of the speech and the direct impact that speech ha[d] on its listeners." *Id.* at 1164 (emphasis in original). *See also Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) (invalidating speech-suppressive regulation though it did not "favor either side of a political controversy").[8]

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7 Put otherwise, if acts of flag destruction did not themselves communicate, it would be difficult to fathom how such acts could impair the flag's capacity to communicate a message of nationhood. It is true that a particular exemplar of a flag, once destroyed, is no longer available to communicate any message. In that limited sense, an act of flag destruction, even if unwitnessed, might be said to impair the ability of that particular flag to continue communicating a message of national unity. But Texas surely cannot be asserting a state interest in assuring that the number of flags available for flying within the State is not diminished by acts of flag destruction.

8 *Amicus* Legal Affairs Council argues that *Boos* and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), support Texas here in that § 42.09 has only a secondary effect on speech. This argument ignores the Court's pronouncement in *Boos* that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." 108 S. Ct. at 1163.

Renton involved a law that regulated speech by reference to the type of movie theatres in which it was spoken, placing stringent restrictions solely on theatres specializing in adult films. 475 U.S. at 47. While this regulation affected the communication conveyed in such theatres, it was not targeted at such communications but rather at the "secondary effects of such theatres in the surrounding community." *Id.* (The effects in question—crime and loss in property values—were "secondary" because, although associated with adult film theatres, they did not result from the communicative impact of an airing of an X-rated film.) *Boos* was a very different case because it involved a regulation aimed at the *primary* impact of speech on listeners, and not at secondary effects unrelated to the content of speech. To use the *Boos* Court's own illustration,

> if the ordinance [in *Renton*] was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. This hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

Boos, 108 S. Ct. at 1163.

Under the teachings of both *Boos* and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Texas flag-desecration statute and others like it "target the direct impact of a particular category of speech," and thus "must be subjected to the most exacting scrutiny." *Id.* at 1163-64.

c. Flag-Desecration Statutes, Because They Limit Expressive Uses of the Flag to Only Those That Communicate Messages Approved of by the State, Are Not Ideologically Neutral.

Amici have demonstrated that a statute like section 42.09(a)(3) is content-based, even if regarded as neutral in terms of viewpoint or ideology. But in fact the statute is ideologically biased at the most elementary level.

Our flag, like most potent symbols, may be employed to communicate myriad messages. All such messages, however, relate back in some way to the flag's central significance as "an

emblem of National Power and National Honor." *Halter v. Nebraska*, 205 U.S. 34, 42 (1907). Desecration statutes like Texas' quite plainly seek to protect "National Honor" by preventing use of the flag to communicate discordant "unpatriotic" messages. This ideological bias alone, when used to justify limiting expressive conduct, necessarily violates the crucial third prong of the *O'Brien* test.

Texas resists acknowledging the flag's primary status as patriotic symbol. But the examples the State gives of the kinds of messages conveyed by the flag illustrate this point quite well.

> At half-mast, it reminds us of the death of a president; on the coffins of our soldiers and dignitaries, it reminds us of the sacrifices made to establish and keep this nation; in the hands of a victorious Olympian, it evokes pride in the accomplishments of our citizens; its abuse at the hands of a middle-eastern terrorist kindles our anger and frustration; on the surface of the moon, it drives our hope for the future.

Petitioner's Brief at 27.

The flag's position as our nation's central patriotic symbol is well recognized in the opinions of this Court,[9] in Congressional statements concerning the flag,[10] and in lay expressions reflecting on the flag's significance.[11] There can be no question that the flag, standing as it does for honor and allegiance to our national government, is a political symbol of ideological force. The nature of Texas' interest in the flag is equally ideological. It is precisely because the flag is a symbol affirming faith in our government that Texas asserts any interest in the flag's symbolic value.[12]

As Texas surely recognizes, just as there are few more powerful ways to convey feelings of pride in our country than to raise the flag high, there are few more powerful ways to express opposition to the government than to publicly destroy a flag for all to see.[13] When the flag is draped over the coffin of a fallen

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9 In *Halter v. Nebraska*, 205 U.S. at 41, the Court described the flag as "the emblem of the American Republic . . . [f]or [which] . . . every true American has not simply an appreciation but a deep affection." Subsequent opinions of the Court refer to the flag as a "symbol of adherence to government as presently organized," *Barnette*, 319 U.S. at 633, and "[f]or the great majority of us . . . the . . . symbol of patriotism, of pride in the history of our country, and of the service, sacrifice and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure." *Spence v. Washington*, 418 U.S. at 413.

10 *See, e.g.*, House Comm. of the Judiciary, *Penalties for Desecration of the Flag*, H. Rep. No. 350, 90th Cong., 1st Sess. at 4 (1967) (to "every true American the flag is the symbol of the Nation's power—the emblem of freedom in its truest, best sense") (quoting *Halter*, 205 U.S. at 43); *Desecration of the Flag: Hearings on H.R. 271 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967) 28 (statement of Hon. James H. Quillen, Rep. of Tenn.) ("For all of us . . . whose hearts are filled with patriotism and love and respect for all that our flag symbolizes, it is deplorable to think that anyone could be so . . . thankless . . . as to scar . . . the traditional symbol of our free land."); 132-33 (statement of Hon. E.Y. Berry, Rep. of S. Dakota) (the flag is a "source of pride and honor to all Americans"); 146 (statement of Hon. Paul G. Rogers, Rep. of Fla.) (flag symbolizes "patriotic reverence" for our government); 203 (statement of Hon. James Kee, Rep. of W. Va.) (flag is sacred emblem of nation inspiring feelings of patriotism).

11 *See, e.g.*, G.H. Preble, *Origin and History of the American Flag* 4 (1917) ("Fidelity to the Union blazes from its stars, allegiance to the government beneath which we live is wrapped in its folds."); B. Mastai & M.L. Mastai, *The Stars and Stripes* 175 (1973) (flag is "our one sole emblem of fidelity"); *The Stars and Stripes Forever*, American Heritage, June 1976 at 9 (flag is used "to signify loyalty, sacrifice, heroism, and other sentiments connected with patriotism").

12 Indeed, Texas describes its prosecution of Johnson as an effort "to punish [him] for trying to destroy the effectiveness of the flag as a symbol revered by the vast majority of Americans." Petition for Certiorari at 49.

13 The then-chairman of the Americanism Committee of the Veterans of Foreign War candidly acknowledged this fact in testifying in favor of the enactment of the federal flag desecration statute: "How could demonstrations against American policy be more vividly and dramatically manifested than by burning the very flag of the United States?" *Desecration of the Flag: Hearings on H.R. 271 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 70, 71 (1967) (statement of Hon. Michael A. Musmanno, Justice, Supreme Court of Pennsylvania).

soldier, it bespeaks honor in service for America; while unfortunate, it should not be surprising that another American who objects to the war in which that soldier fell might burn a flag to symbolize his dissent. So might an American Indian, to show anger at his peoples' dispossession from their lands carried out in the name of this flag. The same flag that is waved proudly by the thousands at a Republican (or Democratic) National Convention could naturally be desecrated in an anti-establishment protest against that Party's governing platform; indeed, that is precisely what happened in this case. One need not applaud this form of expression to understand that flag-desecration statutes like section 42.09 seek nothing less than to reserve the flag's special communicative powers to express patriotic messages preferred by the state.

Such legislative sorting among preferred and disapproved messages is the very essence of content-oriented regulation. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (First Amendment forbids regulating expression "in ways that favor some viewpoints or ideas at expense of others."); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 68 (1976) (noting need for "absolute neutrality" by the government when regulating communication). As Professor Ely has observed:

> Orthodoxy of thought can be fostered not simply by placing unusual restrictions on 'deviant' expression but also by granting unusual protection to expression that is officially acceptable. An 'improper use' statute, neutral respecting the messages it would inhibit though it may be . . . is, at best, analogous to a law prohibiting the interruption of patriotic speeches, and that is a law that is hardly 'unrelated to the suppression of free expression.'

Ely, *Flag Desecration*, *supra* note 5, at 1507-08 (footnotes omitted). In forbidding flagburnings the State not only grants "unusual protections" to acceptable patriotic points of view but, as well, "unusually restricts" expressions of disaffection with the government. This kind of regulation is bluntly speech-suppressive in focus.

2. The State's Interest in Preventing Breaches of the Peace Also Confirms the Speech-Suppressive Nature of the Statute.

The State also seeks to justify its flag-desecration statute on the basis of its interest in preventing breaches of the peace. Here again, however, the State acknowledges its preoccupation with the speech itself; the danger of a violent reaction is only created by what the flagburner communicates in destroying a flag.

For that reason, the Texas statute plainly fails under the *Renton/Boos* content-neutrality test discussed above in Section II.A.1.b. By emphasizing the possibility that bystanders might breach the peace in reaction to the message conveyed by a flag burning, the State justifies the law solely by "reference to the content of the regulated speech" and "focuses *only* . . . on the impact the speech has on its listeners." *Boos*, 108 S. Ct. at 1164 (emphasis in original).[14] Indeed, as footnote 4 of the Respondent's Brief points out, the record in this case demonstrates that both police officers were offended by the burning of the flag because the action *communicated* a lack of respect for our national symbol.

It follows that this case is readily distinguishable from *United States v. O'Brien*, 391 U.S. 367, in which the defendant claimed that the burning of his draft card was symbolic speech entitled to First Amendment protection. There, the Court sustained the defendant's conviction because it recognized "a sufficiently important governmental interest in regulating the non-speech element," *id.* at 376 (*i.e.*, the smooth administration of the Selective Service Act) that was "unrelated to the suppression of free expression." *Id.* at 377. The Court was careful to exempt from its holding those cases in which "the alleged governmental

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14 Professor Nimmer has similarly noted:

> In the context of flag desecration, it is precisely the particular idea conveyed by the act or desecration that is feared will lead to a violent or unlawful reaction. Thus, insofar as the governmental objective is the suppression of the communication of an idea in order to avoid resulting violence, it is an anti-speech interest, *i.e.*, an interest in the suppression of speech.

Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. 29, 53-54 (1973).

interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id.* at 382. Texas' preoccupation with avoiding any violent reaction to a flagburning demonstrates well that such a statute, in the words of the *O'Brien* Court, regulates activity solely because the message that is "integral to the conduct" is "thought to be harmful."

B. On Its Face, the Texas Statute Is Aimed at the Suppression of Speech Because It Singles Out for Punishment Only Those Acts of Flag Destruction the Communicative Content of Which Is Likely to Offend Others.

Amici have argued above that flag-desecration statutes, by their very nature, aim at the suppression of speech. Nevertheless, as *amici* recognize, two members of this Court have indicated that a flag-desecration statute that even-handedly proscribed *all* public acts impairing the physical integrity of the flag would not violate the First Amendment because the operation of such a law would not "depend upon whether the flag is used for communicative or noncommunicative purposes." *Spence v. Washington*, 418 U.S. at 422 (Rehnquist, J., dissenting); *Smith v. Goguen*, 415 U.S. 566, 588 & n.3 (White, J., concurring). The Texas statute, as drafted, falls far short of even that standard.

Section 42.09(a)(3) conditions criminal liability for destroying a flag on whether the actor knows he "will seriously offend one or more persons likely to observe or discover his action." Texas thereby expressly requires communication—and offense—to third parties to trigger the law's proscriptions, and so makes "the communicative aspect of the proscribed conduct . . . a crucial element of the violation." *Smith v. Goguen*, 415 U.S. at 588 n.3 (White, J., concurring).

The Texas statute thus does much more than just remove the flag "from the roster of materials that may be used as a background for communications." *Spence*, 418 U.S. at 423 (Rehnquist, J., dissenting). This is a particularly objectionable law whose operation depends precisely "upon whether the use of the flag is respectful or contemptuous; or upon whether any

particular segment of the State's citizenry might applaud or oppose the intended message." *Id.* at 422-23 (Rehnquist, J., dissenting) (footnote omitted). Put otherwise, by criminalizing only those acts of flag destruction that offend, the State singles out for punishment "those who impair the flag's physical integrity for the purpose of disparaging it as a symbol." *Smith v. Goguen*, 415 U.S. at 597-98 (Rehnquist, J., dissenting). As the Chief Justice has suggested, "such a law . . . abridge[s] the right of free expression." *Id.*

III. BECAUSE ITS AIM IS SPEECH-SUPPRESSIVE, THE TEXAS STATUTE CANNOT WITHSTAND FIRST AMENDMENT SCRUTINY.

A. Laws Directed at the Communicative Impact of Expression Must Be Subjected to the Most Searching Scrutiny and Can Be Sustained Only Under the Most Exigent of Circumstances.

This Court has held repeatedly that laws aimed at the suppression of political expression or its communicative impact are subject to the "most exacting scrutiny." *See, e.g., Boos*, 108 S. Ct. at 1163-64 (1988); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1975) (per curiam). Under this strict standard, such laws must be invalidated unless they either can be shown to serve a demonstrably compelling governmental interest, *see Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, ____, 107 S. Ct. 1722, 1728 (1987); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 540, or can be shown to suppress only expression falling into one of this Court's narrowly circumscribed categories of unprotected speech. *See Brandenberg v. Ohio*, 395 U.S. 444; *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).[15]

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15 *Brandenberg* and *Chaplinsky* define the only two such categories in which speech may go unprotected because of its inflammatory impact on listeners. As discussed below in Section III.B.2, the speech proscribed by the Texas flag-desecration statute fits neither the "fighting words" category represented by *Chaplinsky*, 315 U.S. at 572-73, nor the category of speech "likely to incite lawless action" recognized in *Brandenberg*, 395 U.S. at 448-49.

When the government defends speech-suppressive legislation as necessary to further a compelling objective, the Court ensures free speech the greatest possible protection by insisting upon a further showing that such legislation is both a "necessary" and a "narrowly drawn" means of achieving that objective. *Boos*, 108 S. Ct. at 1164. Absent a sufficiently close nexus between a state-imposed abridgment of speech and the state interest justifying such abridgment, the Court will invalidate the regulation as unconstitutional in scope. *See, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636-39 (1980); *Street*, 394 U.S. at 592.[16]

Applying these stringent requirements, the Court has invalidated laws regulating symbolic conduct when those laws have no true justification apart from suppressing expression or its communicative impact. *See, e.g., Stromberg v. California*, 283 U.S. 359 (1931); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966); *Tinker v. Des Moines School District*, 393 U.S. 503, 508 (1969). For the reasons set forth below, section 42.09 also must be invalidated as a measure directly aimed at suppression of speech, because Texas cannot meet its "heavy burden" of demonstrating that its flag-desecration statute presents "an exceptional case." *Cohen v. California*, 403 U.S. at 24.

B. Texas Has Failed to Demonstrate the Sort of Exigent Circumstances That Would Warrant the Curtailment of Expression.

Texas' first proffered interest in protecting the flag as a symbol of nationhood is not compelling as that requirement has come to be understood by the Court. For that reason it has

16 The First Amendment imposes an analogous requirement upon statutes that seek to proscribe unprotected speech. If such statutes sweep beyond the narrowly circumscribed categories of unprotected speech, they are invalidated as "overbroad." *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 107 S. Ct. 2568, 2571 (1987). Of course, the Constitution also requires that criminal statutes be precisely drafted so as to clearly define their proscriptions. *Amici* contend that § 42.09(a)(3)'s proscription of acts that "the actor knows will seriously offend one or more persons likely to observe or discover his actions" is both an overbroad and unconstitutionally vague standard. These arguments are fully briefed by the Respondent. *See* Respondent's Brief at Section II.C.

twice before been rejected as justifying prohibitions on expression. *Street*, 394 U.S. at 593; *Spence*, 418 U.S. at 412-414. In addition, this interest is not shown to be threatened by acts of flag destruction. Were the interest so threatened, there exist means of serving it that surely are less restrictive of free expression than section 42.09.

The State's other claimed interest in preventing breaches of peace is no more availing. To the extent section 42.09's proscription of "offensive" flag destructions relates to any interest in preserving public order, this Court's decisions leave no doubt that flag desecrations do not fall into the few categories of speech that remain unprotected by the Constitution because of their potentially excitive impact upon others.

1. Texas' Interest in Protecting the Flag as a Symbol of Nationhood Cannot Justify Section 42.09's Abridgment of Expression.

Texas defends its flag-desecration statute principally on the ground that it serves a state interest in preserving the flag as a symbol of national unity. One dimension of that interest is a concern on the part of Texas to promote an attitude of veneration for the flag and for our country. *See* Section II.A.1.c., *supra*. Its second dimension is, as depicted by the State, a non-ideological one: that the flag as symbol, venerable or otherwise, remain undiluted in meaning lest it lose its *capacity* to signify nationhood. Petitioner's Brief at 29. Neither aspect of Texas' interest in preserving the flag as a symbol is so compelling as to justify the statute's bald abridgment of expression.

Street plainly addresses, and dispenses with, just such a claimed state interest in promoting "respect for our national symbol":

> We have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.

394 U.S. at 593 (quoting *Barnette*, 319 U.S. at 641-42). *See also Spence*, 418 U.S. at 412-14. The government, of course, is as free as its citizens to foster, through its good actions and powers of expression, sentiments of national pride and unity. But the Constitution forbids the government from pursuing those legitimate ends by punishing its citizens for expressing disrespect for national symbols, just as it prohibits the state from forcing citizens "to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

To hold otherwise would truly invite a reorientation in the government's relationship to the citizenry. The "very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating . . . speech." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (*quoted in Riley v. Nat'l Federation of the Blind*, ____ U.S. ____, 108 S. Ct. 2667, 2674 (1988)). Through section 42.09, the government of Texas assumes that role as guardian of the public mind, seeking to insulate the flag as a venerated sign of national unity. However virtuous that aim, the Constitution forbids its invocation as a ground for suppressing expression.

Section 42.09 can no more be justified, however, by the second dimension of Texas' interest in the flag as national symbol. Here, Texas seeks to prevent the dilution of the flag's capacity to communicate the concept of nationhood, quite apart from whatever subsidiary attitudes citizens may have toward flag and nation.[17]

Texas has, however, failed to make any showing that the flag's status as a symbol communicating nationhood is impaired by acts of flag desecration. The State's almost "talis-

17 One may doubt whether a state interest in preserving the clarity of symbols is one compelling enough ever to justify the direct infringement of expression. It may be that the interest Texas asserts is not simply in ensuring that the flag continues to function as a clear symbol of nationhood but, as well, that it function as nothing *other* or *more* than a symbol of the greatness of our country. If this be Texas' true interest, it is one that collides with the Constitution. If the guarantee of free expression means anything at all, surely it does not abide government control of the very meaning of the symbols that compose our vocabulary of communication. State action of just that sort is a feature of totalitarian government.

manic reliance on the mere assertion of" this, *Riley*, 108 S. Ct. at 2674, cannot substitute for a demonstration of the actual nexus between asserted harm and regulated act which this Court demands. *See, e.g., Village of Schaumburg*, 444 U.S. at 633-34.[18]

It seems more plausible that flag desecrations have the opposite effect, by reinforcing in the public mind the connection between the flag as a physical object and its symbolic status as a sign of our nation. On the assumption, however, that acts of flag desecration somehow do impair the capacity of the flag to symbolize nationhood, Texas has available to it means of reinforcing that symbolic function that do not impair rights afforded to its citizens by the First Amendment.

The State may counteract such public desecrations by speech and conduct of its own. Texas is free to promote the flag's symbolic function by flying it on public grounds, by encouraging its citizens to fly the flag at home, by schooling children in its history, and by setting apart a regular day for observance of its function. *Cf. Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (noting that New Hampshire may disseminate ideology of state pride "in any number of" non-abridging ways); *Linmark*, 431 U.S. at 97 (suggesting less speech-restrictive alternatives of

18 The failure of Texas to establish that nexus is a product of the State's confusion of the *concept* of the United States flag (*i.e.*, a design composed of fifty stars and thirteen stripes upon a red, white and blue background) with discrete physical renderings of that concept. When we say the flag symbolizes nationhood, we recognize a long-standing association in the public mind between the design described above and our nation. But the symbolic equation of flag and country is not destroyed (or even threatened) by the destruction of an individual reproduction of that design.

The same fallacy is embedded in analogies too easily made between desecrations of national monuments, such as the Lincoln Memorial, and desecrations of "the flag". There are countless United States flags but only one Lincoln Memorial (serving as both "concept" and government-owned corporeal manifestation). A true analogy therefore is not to a law that proscribes defacement of the Lincoln Memorial itself but to one that proscribes the destruction of a Lincoln Memorial replica purchased on a Washington, D.C. sidewalk. Of course, destruction of such a replica no more impairs the meaning of the Lincoln Memorial than does the desecration of a particular cloth or paper rendering of the flag impair the link between our flag and our nationhood.

government-sponsored publicity and education). As Justice Brandeis wisely counseled in *Whitney v. California*, 274 U.S. 357, 377 (1920): "If there be time to . . . avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."[19]

Texas has made no such emergency showing. Indeed, the State has adduced no evidence at all that the flag's capacity to symbolize nationhood to its citizens is endangered in the least or that acts of flag destruction pose such threat.[20] A statute that abridges expression cannot be upheld on such slender grounds.

2. Texas' Interest in Preventing Breaches of the Peace Does Not Justify Section 42.09's Wholesale Prohibition of "Offensive" Flag Destruction.

Texas' second stated concern is to staunch possible violent reactions of observers offended by acts of flag desecration. The State's chosen method of doing so is to prohibit not those violent reactions but the offending expressive acts that allegedly give rise to them. There is no question that the prevention of breaches of peace is a legitimate state interest that may be promoted by a law properly drawn and applied. But, equally clear is that section 42.09(a)(3), as applied to accomplish that end, fails to satisfy long-settled constitutional standards.

Brandenberg v. Ohio, 395 U.S. 444, holds that unless an expressive act is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action," *id.* at 447, a state's interest in preventing a breach of peace cannot support punishment of expression. Under this standard, Johnson's prosecution for flagburning was unconstitutional.

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19 Texas' argument that Johnson could have conveyed his message by alternative means thus stands the required analysis on its head. This Court's decisions clearly teach that Texas, not Johnson, is obliged to pursue alternative, less restrictive means of pursuing its ends. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 541 n.10 ("we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression."); *Spence v. Washington*, 418 U.S. at 411 n.4 ("summarily" rejecting argument that prohibition of symbolic flag alterations was permissible as "trifling" speech abridgment because "other means" could be used to express the same views).

20 Interestingly, the Reporter who in 1968 prepared the preliminary draft of the Texas law at issue recognized that the burning of a flag as a form of protest posed no emergency. As then proposed, the statute would have criminalized flag desecration only when performed on a "national flag *owned by another*." A.W. Alschuler, "Article 250—Offenses Against Public Order: A Preliminary Draft for the State Bar Committee on the Revision of the Texas Penal Code" (Draft 1) (July 9, 1968) (attached hereto as Appendix B) (emphasis added). As the Reporter explained in his Comment to the provision:

> The draft is . . . less stringent than the [Model Penal Code] in that it does not punish the desecration of an object owned by the actor himself, even if the desecration occurs in public. The practice of mutilating American flags as a form of protest has recently attracted public and legislative attention . . . . [T]he reporter considers criminal punishment an inappropriate sanction for this obnoxious but essentially harmless behavior.
>
> Flag-burning may be offensive to a large segment of the population. So is shouting 'To Hell with America!' and 'Hooray for Mao Tse Tung!'—both of which are plainly protected activities. In the reporter's opinion, America has broad enough shoulders to endure this sort of insult. Ignoring insulting behavior may, in fact, be a more effective remedy than punishment, for an indignant response is probably what most flag-burners expect and desire. Restraint may be a sign of self-confidence, not of weakness. It may be the better part of patriotism.

The treatment of flag desecration in other nations is also worthy of note. Great Britain, Canada and Australia, countries with democratic traditions closest to our own, have no such statute. Neither does France (with the exception of Article 440 of the Code de Justice Militaire, applicable to members of the armed forces), Switzerland, Sweden or Holland. Japan (Article 92, Criminal Code) only penalizes desecration of *another* nation's emblem. Yet the flags of the above countries—including the Union Jack, the Tricolore and the Hinomaru (Rising Sun)—have histories as rich as does our own. On the other hand, West Germany (Article 90a, Penal Code) has carried forward that country's long tradition of prohibiting displays of disrespect for state symbols. The Soviet Union has such a prohibition as well. *See* H. Berman and J. Spindler, *Soviet Criminal Law and Procedure* 181 (2d ed. 1972) (Article 190-2 of RSFSR Criminal Code).

The State of Texas admits that no actual breach of the peace occurred at the time of Johnson's act or in response thereto. The Texas Court of Criminal Appeals held that the situation in which Johnson burned the flag was not even "potentially explosive." (Pet. App. at 13.) The only citizen response to the flagburning appears to have been that of Daniel Walker, who gathered the remains of the flag and buried them in his backyard. (R.III 273-274).

Texas seeks, however, to justify its conviction of Johnson based upon the *possible* tendency of his expressive act to provoke violent reaction. This Court's opinion in *Street v. New York*, 394 U.S. 576, disposes of that attempt. In *Street*, after recognizing the possibility that those witnessing disrespectful treatment of the flag "might [be] moved to retaliate," the Court rejected the contention that desecrations of flags are so "inherently inflammatory" as to be " 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.' " 394 U.S. at 592 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. at 574). *See also Tinker v. Des Moines Indep. School Dist.*, 393 U.S. at 508 ("Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."). For the same reason, this Court must reject Texas' breach-of-peace justification as applied to Johnson. Texas quite simply has failed to demonstrate that Johnson's conduct amounted to "fighting words" likely to provoke retaliation.[21]

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21 Johnson's action did not constitute "fighting words" for another basic reason: his message was not directed "to any person or group in particular." *Hess v. Indiana*, 414 U.S. 105, 107 (1973). But even had Johnson's specific acts been targeted at a particular individual and been likely to inspire that person to retaliate, § 42.09 is on its face unconstitutional. For that statute in no way limits its proscription to only those acts of flag desecration having "a direct tendency to cause acts of violence," as did the statute before the Court in *Chaplinsky*. *See Gooding v. Wilson*, 405 U.S. 518, 523 (1972); *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 2510 (1987). Rather, the Texas statute criminalizes any act of flag desecration likely to cause one who observes (or even later discovers) the act to take "serious offense." As written by the Texas legislature and as construed by Texas' highest criminal court, § 42.09's sweep is therefore far too broad to be adjudged constitutional. *See* Respondent's Brief at Part II.C.2.

Indeed, the courts have regularly extended protection to far more provocative symbolic expression than that at issue here. Our Constitution demands this. In *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978), the Court of Appeals for the Seventh Circuit invalidated, on First Amendment grounds, an ordinance passed in Skokie, Illinois, which would have prohibited the American Nazi Party from marching in a predominantly Jewish neighborhood inhabited by a substantial population of Holocaust survivors. Acknowledging that the Nazis' march might disturb many residents to the point of violence; the court nevertheless struck down the ordinance.

Similarly, several of this Court's early civil rights cases overturned convictions in which symbolic speech had been silenced on a breach-of-peace rationale. Though these cases involved protests of segregation in the bitterly divided, and often violent, South of that era, this Court was not persuaded that symbolic speech should fall prey to the mere possibility of violence, even where that possibility had been amply demonstrated by example. *See, e.g., Taylor v. Louisiana*, 370 U.S. 154 (1962) (per curiam) (sit-in in segregated bus depot); *Garner v. Louisiana*, 368 U.S. 157 (1961) (sit-in at segregated lunch counter). *See also Terminiello v. Chicago*, 337 U.S. 1 (race-baiting speech likely to attract an "angry and turbulent" crown enjoys First Amendment protection).

Given the Court's shielding of these types of highly inflammatory expression in the face of possibly violent, and historically proven, retaliation, there should be little doubt that Johnson's burning of the flag to express opposition to our government, while offensive to many, was nonetheless protected speech.[22]

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22 If Texas is truly concerned with preventing a breach of the peace during a political rally, our constitutional order requires greater protection against threatened disruption, and not simply the proscription of controversial expression. *See* Z. Chafee, *Free Speech in the United States* 245 (1948); T. Emerson, *The System of Free Expression* 341 (1970). Johnson's expressive conduct occurred during the course of a planned, controversial demonstration held pursuant to police permit. As in *Edwards v. South Carolina*, 372 U.S. 229, 232-33 (1963), the city had ample opportunity to arrange for police protection for the demonstrators and no facts suggest that the police presence was insufficient "to meet any foreseeable possibility of disorder."

CONCLUSION

For the reasons set forth above, the judgment of the Texas Court of Criminal Appeals should be affirmed.

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January 25, 1989

Respectfully submitted,

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APPENDIX A

Description of Individual Amici

The Christic Institute is a public interest law firm and religious public policy center with a national network of 75,000 people. The Institute is dedicated to the objective of protecting the free and unrestricted expression by citizens of their religious, social and political views.

Clergy and Laity Concerned (CALC) is a national peace and justice organization of 24,000 members that was founded by Dr. Martin Luther King, Rabbi Abraham Joshua Heschel, Dr. William Sloan Coffin, Dr. John Bennet and Father Daniel Berrigan. CALC was formed as a vehicle to organize against the war in Vietnam.

The Committee of Interns and Residents ("CIR") is a labor organization representing 5,000 house staff officers (interns, residents and fellows) in hospitals and health care facilities. The members of CIR make demonstrative as well as verbal expressions of their views on a variety of professional, political and union-management matters.

The Community For Creative Non-Violence ("CCNV") is an unincorporated association based in the District of Columbia that supplies food, shelter, and other assistance to homeless persons. Formed in 1970 in response to the war in Vietnam, CCNV has focused predominantly on poverty issues since 1976. There are 50 members of the community, many of whom were formerly homeless. On numerous occasions CCNV has conducted demonstrations to focus attention on the poor and often uses symbolic speech, in a wide variety of forms.

The Fellowship of Reconciliation ("FOR") is an international religious pacifist organization founded 74 years ago. FOR has 36,000 members. Throughout its history FOR has been concerned with the issues of freedom of speech and political persecution of citizens by their governments for the expression of political dissent.

La Raza Lawyers' Association of San Francisco is an unincorporated professional organization made up of Latino lawyers practicing in the City and County of San Francisco, California. The Association believes that symbolic speech is a

proper exercise of freedom under the First Amendment of the United States Constitution.

Lambda Legal Defense and Education Fund, Inc. ("Lambda"), founded in 1973, is the nation's oldest and largest legal advocacy organization working in support of the rights of lesbians and gay men. It has 10,000 active supporters. The protection of the rights to free speech and association is of utmost importance to Lambda's work and to the community it represents. The escalation of incidents of violence against lesbians and gay men and the AIDS epidemic have forced the gay and lesbian community to become more vocal in its attempts to achieve equal protection under the law. Lambda believes it must strive to protect its freedom of speech and association as a means of making its members' voices heard.

The Lawyers' Committee On Nuclear Policy ("LCNP"), founded in 1981, is a national, non-profit educational association of 600 lawyers and legal scholars in 42 states and 11 foreign countries concerned with legal aspects of the nuclear weapons debate. LCNP supports the abolition of nuclear weapons through the promotion and strengthening of law and nonviolent mechanisms for resolving international disputes, and believes that citizens have a fundamental right and obligation to protest against government activity that the Committee perceives to be illegal.

The Nation Institute of New York City is a private, nonprofit foundation which undertakes research, educational programs and other projects concerned with civil rights and civil liberties, particularly those protected by the First Amendment.

The National Conference of Black Lawyers ("NCBL") is an activist organization of lawyers, law professors, judges, law students and legal workers dedicated to serving as the legal arm of the Black community. Since its founding in 1968, NCBL has been actively involved in the continuing struggle against racial discrimination and political repression. NCBL resolutely supports the right of individuals and groups to freely express themselves in speech—whether direct or symbolic.

The National Emergency Civil Liberties Committee, having 10,000 members, is an organization which since 1951 has been concerned with the protection of the constitutional rights of

American citizens and persons residing in the United States. Its particular interest has been with the First Amendment. In that connection, it has represented numerous individuals and organizations before this Court.

The National Lawyers Guild is an association of over 7,000 attorneys, law students, legal workers and jailhouse lawyers. The Massachusetts Chapter of the National Lawyers Guild represents The National Organization and its interests in the State of Massachusetts. The Lawyers Guild has been at the forefront of the effort to defend and expand the constitutional protection of First Amendment freedoms since its founding in 1937.

The National Organization For Women, Inc. ("NOW") is the largest feminist organization in the United States, with a membership in excess of 155,000 in more than 750 chapters throughout the country working on a wide variety of women's rights, civil rights and human rights issues. NOW's tactics include not only traditional education and lobbying, but also extensive public mobilization and visibility campaigns involving marches, rallies, pickets and other public demonstrations of support for NOW's issues. NOW has a great interest and experience in defending the First Amendment's protection of free speech and political dissent.

The New York State Association of Criminal Defense Lawyers is a statewide organization of lawyers whose principal concern is the protection of the constitutional safeguards embodied in the Bill of Rights, including the First Amendment rights of criminal defendants and all other citizens.

People For The American Way is a nonpartisan, education-oriented citizen's organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to the nation's heritage of tolerance and pluralism, People For The American Way now has 275,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of the democratic tradition and to defend it against attacks from those who would seek to limit our fundamental freedoms, particularly our First Amendment rights.

Toward A More Perfect Union is a national coalition of progressive organizations and individuals, including legal groups,

academics and labor unions. The coalition was formed as a unified forum to express concerns over the present constitutional crisis and develop a broad educational campaign for a progressive celebration of our country's constitutional legacy during the Bicentennial period, 1987 through 1991. The coalition is committed to organizing widespread citizen involvement in recognizing and acting upon the dangers facing civil liberties today in the hope that such acknowledgment and action will strengthen and enhance the Constitution and the Bill of Rights, including the expression of symbolic speech.

The United Electrical, Radio and Machine Workers Of America ("UE") is a national labor organization committed to organizing workers regardless of craft, race, nationality, sex, age, religion, political belief, or immigration status and to representing and defending its membership in their efforts to improve their wages, working and living conditions. The UE has a proud history of fighting for the rights of all of its members, not only in the work place but in the courts and legislative arena as well.

Wabun-Inini, Anishinabe (a/k/a Vernon Bellecourt), is a representative of the American Indian Movement ("AIM"), which was formed to carry on the 500-year struggle for survival of the original and natural peoples of this land. He supports, on behalf of AIM, symbolic expression that is crucial for protest to be heard.

The War Resisters League ("WRL") was founded in 1923 as an organization committed to non-violence and to finding alternatives to war. It has 13,000 members. WRL rejects all use of organized violence in civil war, revolution, or in defense of the state, and has generally supported the ideas of Mahatma Gandhi and Dr. Martin Luther King, Jr.

The Writers Guild of America, East, Inc. is a union of writers in screen and television, having over 3,000 members. The Guild believes in the protection of free expression—even that expression which challenges or threatens honored symbols.

APPENDIX B

1b

ARTICLE 250—OFFENSES AGAINST PUBLIC ORDER
(excluding vagrancy and drunkenness offenses)

A PRELIMINARY DRAFT FOR THE STATE BAR COMMITTEE ON THE REVISION OF THE TEXAS PENAL CODE

DRAFT 1—JULY 9, 1968

by

ALBERT W. ALSCHULER

Sec. 250.10. DESECRATION OF VENERATED OBJECTS.

A person commits a gross misdemeanor if he intentionally desecrates

(a) a public monument or structure;

(b) a place of worship or burial;

(c) a state or national flag owned by another; or

(d) any other object of veneration owned by another.

Desecrate means deface, damage, pollute, or otherwise physically mistreat in a way that the actor knows may seriously offend one or more persons likely to observe or discover his action.

COMMENT

This section is derived from the Model Penal Code, but it is broader in some respects and narrower in others. Unlike the M.P.C., this draft does not require that the actor's conduct be offensive to more than one person; it does not require that the actor's conduct occur in a public place; and it does not require that an object be venerated by "the public or a substantial segment thereof" before its desecration can be punished. Thus, although the defilement of a personal religious symbol in a private room is not specifically condemned by the M.P.C., this conduct would be punishable under the proposed draft.

The draft is, however, less stringent than the M.P.C. in that it does not punish the desecration of an object owned by the actor himself, even if the desecration occurs in public. The practice of mutilating American flags as a form of protest has recently attracted public and legislative attention. A case currently pending in the United States Supreme Court raises the question whether this activity is constitutionally protected. Regardless of the outcome of this case, the reporter considers criminal punishment an inappropriate sanction for this obnoxious but essentially harmless behavior.

Flag-burning may be offensive to a large segment of the population. So is shouting "To Hell with America!" and "Hooray

for Mao Tse Tung!"—both of which are plainly protected activities. In the reporter's opinion, America has broad enough shoulders to endure this sort of insult. Ignoring insulting behavior may, in fact, be a more effective remedy than punishment, for an indignant response is probably what most flag-burners expect and desire. Restraint may be a sign of self-confidence, not of weakness. It may be the better part of patriotism.

Although the proposed draft is narrower than the M.P.C., the M.P.C. is narrower than current Texas law. Article 152 of the Texas Penal Code declares that a person who "casts contempt upon any flag, standard, color, or ensign of the United States," whether "by word or act," is punishable by "confinement in the penitentiary for not less than two nor more than twenty-five years." In an apparently never-enforced provision, the Code also prohibits use of the flag for commercial purposes. Tex. Pen. Code Ann. art. 148 (1952), et seq.; Tex. Civ. Stat. Ann. art. 6139 (1962), et seq. The Civil Statutes permit private individuals to enforce what are essentially criminal penalties, and these provisions should be repealed when the revised criminal code is enacted.

Texas' current statutory provisions on the desecration of graves seem unnecessarily elaborate. They specifically forbid, for example, removing a fence that encloses a cemetery without the owner's consent. See Tex. Pen. Code Ann. arts. 528, 528(a) (1952). Every act punished by existing law will, however, remain subject to sanction under the revised code—either under this section or under the section on criminal mischief.

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No. 88-155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF TEXAS,

Petitioner,

—v.—

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF *CERTIORARI* TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE TEXAS CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan membership organization dedicated to defending the principles embodied in the Bill of Rights. The Texas Civil Liberties Union (TCLU) is its statewide affiliate.

Attorneys associated with the TCLU represented respondent in the Texas state courts. Although respondent has since obtained other counsel, we continue to believe that this case raises important questions about the state's ability to enforce political orthodoxy through the criminal law.

That is the issue around which the ACLU was founded in 1920, and it has

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1/ Letters of consent to the filing of this brief have been lodged with the Clerk pursuant to Supreme Court Rule 36.2.

remained a critical issue for the ACLU ever since. In the intervening years, the ACLU has appeared before this Court hundreds of times, either as counsel for one of the parties or as amicus curiae.

SUMMARY OF ARGUMENT

At stake in this case is a state's strict accountability for content-based legislation, and the freedom of an individual to use the powerfully symbolic non-violent act of burning the American flag to express dissent from the State's view of nationhood.

Texas Penal Code Ann. §42.09 on its face punishes only flagburning that sends a message likely to "seriously offend" observers. Because the statute turns on audience reaction, it is by its nature content-based. Under the First Amendment,

the State may not penalize speech because it disagrees with either its content or viewpoint.

Section 42.09 is also unconstitutional as applied to respondent in this case. The flagburning at issue here took place during the Republican National Convention, and was part and parcel of a political demonstration protesting the policies of the Reagan Administration. As such, it clearly sent a particular message; the State does not seriously contend otherwise. To the contrary, the State relies on the expressive nature of the flagburning to establish a violation of §42.09, which criminalizes the "desecration of a venerated object" only if it "seriously offends" observers.

In defense of its statute, the State primarily argues that it has the right to preserve the flag as a symbol of national

unity. In fact, that rationale highlights the statute's unconstitutionality. It has been settled law for nearly fifty years that the State may not use its coercive power to command respect for the nation or its symbols. Political symbols, like other forms of speech, must be allowed to clash in the marketplace of ideas.

The State's second asserted interest -- in preventing breaches of the peace -- also fails to justify either §42.09 or its application here. Seeking to prevent violent conflict may be permissible where seeking to prevent ideological conflict is not. Section 42.09, however, prohibits not only flag desecration that incites lawless action or reaction, but reaches any flag desecration likely to "seriously offend" an audience.

In addition, §42.09 is unconstitutionally vague because it is not possible to discern what conduct might "seriously offend" unidentified observers. Such vague language fails to give clear notice of what is prohibited, and chills protected expression. It also creates an impermissible risk that the prosecution, judge, and jury will rely on their own notions of offensiveness in evaluating a defendant's conduct. In this case, that danger is compounded by the introduction of evidence of statutorily irrelevant, constitutionally protected, but potentially "offensive" words uttered by respondent and others.

Because the State's content-based, vague law was applied in this case to suppress protected expression, and because neither the law nor its application is compellingly justified by a neutral state

interest, Johnson's conviction and the law under which it was obtained must fail.

STATEMENT OF THE CASE

Amici adopt the statement of facts set forth in Respondent's Brief. We also emphasize two critical aspects of this case shown most clearly in the brief filed by petitioner, the State of Texas, and in the trial transcript: First, in obtaining Johnson's conviction, the prosecution relied not only on the act of flagburning, but on the words uttered by Johnson during the demonstration at which the flag was burned. Second, the State prosecuted Johnson only for flagburning, and yet introduced testimony of vandalism to suggest that the symbolic flagburning in this case belongs in a category with

property crimes that may constitutionally be regulated.

The jury that convicted heard substantial evidence about what the "protesters" chanted, as well as about the actual flagburning for which Johnson was arrested. Both Texas and the amici supporting it disclaim any attempt to suppress speech critical of the United States. Petitioner's Brief at 40, 41-42; Brief Amici Curiae of Washington Legal Foundation, et al. at 3-5.[2/] Yet the trial record and the State's briefs are filled with references to testimony by the State's witnesses that Johnson and others uttered highly unpopular words and slogans. For example, the Texas

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2/ Hereinafter, Petitioner's Brief will be cited as "Pet. Br. at __," and the Brief Amicus Curiae of Washington Legal Foundation will be cited as "WLF Br. at __." The Record will be cited as "R.II-__."

brief describes the critical testimony as follows:

> Officer Stover saw the United States flag being burned while protesters chanted "America, the red, white and blue, we spit on you." (R.II-91). Officer Stover testified that she was seriously offended by seeing the burning of the flag, though she was not able to see who had burned the flag. (R.II-92).

Pet. Br. at 5. See R.II-90-92, 163-64.

As amici summarize the evidence, "Johnson took the flag along with him as he led the march to the front of Dallas City Hall, shouting along the way, 'Fuck you, America' while 'shooting the finger,' according to one police officer." WLF Br. at 1. See R.II-87. See also RII.78. Were the emphasis on Johnson's words only lawyers' rhetoric in an appellate court it would not be constitutionally problematic. What is important is that all these irrelevant and highly prejudicial statements were

introduced in the record of a trial ostensibly devoted solely to what the State characterizes as a content-neutral charge of flagburning.

In an apparent attempt to give weight to the flagburning charge, the prosecution also introduced evidence that the demonstrators destroyed bank deposit slips and potted plants, R.II-75, 79, 157, and spray-painted on the walls, windows and carpets of various businesses, R.II-76, 79, 81, 85-86. Johnson, however, was not prosecuted for either vandalism or destruction of property.

I. THE TEXAS STATUTE ON ITS FACE ABRIDGES FIRST AMENDMENT RIGHTS BECAUSE IT PROSCRIBES CONDUCT BASED ON ITS CONTENT AND VIEWPOINT

In his concurrence to Smith v. Goguen, 415 U.S. 566, 588 (1974), Justice White distinguished between a statute forbidding

all acts of flag abuse or destruction and a statute criminalizing only acts contemptuous of the flag. As Justice White observed, a statute aimed at contemptuous treatment alone is "not [designed] to protect the physical integrity [of the flag] or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature." Id. Therefore, any conviction for treating a flag "contemptuously" is constitutionally infirm because it depends on the viewpoint expressed by the defendant's conduct.3/

3/ In an accompanying footnote, Justice White noted that Massachusetts had not "construed its statute to eliminate the communicative aspect of the proscribed conduct as a crucial element of the violation." Id. at 588 n.3. Justice Blackmun disagreed. His dissenting opinion concluded that,

> [h]aving rejected the vagueness challenge (continued...)

Texas Penal Code Ann. §42.09 presents precisely the problem that Justice White identified in Goguen -- flagburning is proscribed only to the extent that it will "seriously offend" its audience. Unlike the statute in Spence v. Washington, 418 U.S. 405 (1974), which did not depend "upon whether any particular segment of the State's citizenry might applaud or oppose the intended message," id. at 422-23 (Rehnquist, J., dissenting), this statute ex-

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3/ (...continued)
and concluded that Goguen was not punished for speech, the Massachusetts court, in upholding his conviction, has necessarily limited the scope of the statute to protecting the physical integrity of the flag.

Id. at 591. Whether one agrees with Justice Blackmun that the Massachusetts statute in Goguen had been narrowed to protect expressive conduct, or with Justice White that it had not, it is clear that the Texas Court of Criminal Appeals has not cured the constitutional infirmity of §42.09. To the contrary, the Texas court found that §42.09 was unconstitutional precisely because it reached activity protected by the First Amendment.

plicitly turns on the anticipated reaction of the audience. When a law is "directed at the communicative nature of conduct," the restrictions it imposes "must . . . be justified by the substantial showing of need that the First Amendment requires." Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622 (D.C.Cir. 1983) (Scalia, J., dissenting), rev'd sub nom. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)(emphasis in original).

Twice in the past year this Court has stressed that a statute restricting speech based on its anticipated effect on observers is impermissibly content-based, even where the government itself has not distinguished between viewpoints. Boos v. Barry, 485 U.S. ___, 108 S.Ct. 1157, 1162-

63 (1988); Hustler Magazine v. Falwell, 485 U.S. ___, 108 S.Ct. 876, 882 (1988).4/

Here, the government has hardly remained viewpoint neutral. Its defense of the statute in terms of national unity merely highlights the obvious: that the statute is directed only at those individ-

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4/ Texas contends that the statute does not depend on the reactions of others because a violation could be proved without evidence that any person was seriously offended; proof of action "intentionally designed to seriously offend other individuals" is enough. Pet. Br. at 44. The State's interpretation of the statute does not, however, cure its constitutional infirmity. When a statute turns on even abstract projections as to the reactions of others, it is impermissibly content-based. See e.g., Boos, 108 S.Ct. at 1161 (invalidating a prohibition on signs "designed or adapted" to bring foreign governments or their policies into public odium or public disrepute, without regard to actual negative public reaction); Hustler, 108 S.Ct. at 882 (rejecting an "outrageousness" standard without regard to actual outrage because the standard "has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression").

uals who take a different view of the flag than does the State of Texas.

This Court's unwillingness to allow First Amendment rights to be determined by audience reaction is well-grounded in both constitutional theory and recent history. See e.g., Edwards v. South Carolina, 372 U.S. 229 (1963). Without such a rule, the protection afforded to speech would continuously shift with the changing political winds. For example, one can imagine that a pro-segregationist burning an American flag during the 1950's and 1960's would not have been prosecuted under this statute when many supported the belief that the federal government was invading states' rights. Today, when overt opposition to integration has become less popular, that same segregationist would reasonably anticipate prosecution. Similarly, if Johnson had

announced that he supported the President's policies in Central America and then burned his flag as a memorial to the Contras who died fighting in Nicaragua, it is entirely plausible that he would not have been prosecuted or, if prosecuted, not convicted.

Because no compelling state interest justifies §42.09's content-based speech restriction, see infra Point III, the statute is unconstitutional on its face.

II. THE TEXAS STATUTE WAS UNCONSTITUTIONALLY APPLIED IN THIS CASE BECAUSE THE FLAGBURNING WAS SYMBOLIC EXPRESSION PROTECTED BY THE FIRST AMENDMENT

There is no doubt that the flagburning in this case was an act of political symbolism, and that it was clearly perceived as such by everyone who observed it. Even

the State did not argue otherwise below. 706 S.W.2d 120, 123 (Tex.App. 1988).5/

The Texas courts were also unanimous on this point. The Texas Court of Appeals, which affirmed Johnson's conviction, and the Texas Court of Criminal Appeals, which reversed it, each found that respondent's conduct was entitled to heightened First Amendment scrutiny because "Johnson intended to convey a particularized message, his dissatisfaction with the Reagan Administration's policies," and that message was "very likely to be understood by those who

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5/ "If the government were to contend that [respondent was] not engaged in expressive conduct, it would be confessing that [respondent] did not commit the crime charged." Kime v. United States, 459 U.S. 949 (1982)(Brennan, J., dissenting from denial of certiorari).

viewed it." 706 S.W.2d at 123; accord, 755 S.W.2d 92, 95 (Tex.Crim.App. 1988).6/

To claim that this case does not involve symbolic expression is to ignore the holdings of this Court in cases like Spence, 418 U.S. 405, Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969), Brown v. Louisiana, 383 U.S. 131 (1966), and Stromberg v. California, 283 U.S. 359, 368-70 (1931), all of which held the First Amendment applicable to non-verbal acts intended to express a clear political message.7/

6/ This conclusion echoes the comment of Justice Rehnquist in Smith v. Goguen, who noted in dissent:

> I have difficulty seeing how Goguen would be found by a jury to have treated the flag contemptuously by his act and still not have expressed any idea at all.

415 U.S. at 593.

7/ It is, of course, a truism that not all symbolic expression is immune from government action.

(continued...)

Like the defendant in Spence, the respondent here intended "to convey a particularized message . . . and in the surrounding circumstances the likelihood was

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7/ (...continued)
A "misdemeanor is not excused merely because it is an act of flamboyant protest." Street v. New York, 394 U.S. 576, 617 (1969)(Fortas, J., dissenting). But most criminal statutes have a justification independent of any message communicated by the actor. Section 42.09, however, has no rationale except to prohibit political messages offensive to the State's conception of national unity. See infra Point IIIA.

By contrast, another subdivision of the same statute prohibits the desecration of publicly or privately owned monuments or burial sites. See §§42.09(a)(1) and (2). Such acts may be prohibited without offense to the First Amendment because the Constitution does not protect the desecration of someone else's cherished property. Section 42.09 (a)(3), however, applies regardless of whose flag is desecrated.

Although Texas tries to suggest in its brief that the flag that Johnson was convicted of burning was stolen from a bank building, the jury was not asked to find this, and made no such finding. Texas concedes this when it says only that the flag was "in all probability . . . taken from the Mercantile Bank building's flagpole." Pet. Br. at 45.

great that the message would be understood by those who viewed it." 418 U.S. 411-12. Like Spence, therefore, this is "a case of prosecution for the expression of an idea through activity." Id. at 412.8/

The fact that respondent's views might have been expressed in other ways is constitutionally irrelevant. See Consolidated Education Co. v. Public Service Comm'n, 447 U.S. 530, 541 n.10 (1980). As this Court has recognized in political protest cases, the medium is often the message. For example, in Brown v. Louisiana, plaintiffs conveyed their civil rights message in a way that pickets or letters could not: "They sat and stood in the room, quietly,

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8/ When the prosecution introduces evidence of the words spoken during a flagburning, as it did here, it creates an unacceptable risk that the jury will convict based on its perception of the "serious offense" created by defendant's words rather than his deeds. Cf. Street, 394 U.S. 576.

as monuments of protest against the segregation of the library," 383 U.S. at 139. This Court acknowledged that their "silent and reproachful presence" was uniquely expressive and therefore protected by the First Amendment. Id. at 141-42. Similarly, in Cohen v. California, 403 U.S. 15, 27 (1971), the use of particular words was protected because they conveyed "not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well."

In short, there can be no doubt that the flagburning in this case was part of the protesters' message of opposition to the Reagan Administration and its policies, and that the flagburning itself added an expressive dimension that words could not supply.

III. NO COMPELLING STATE INTEREST UNRELATED TO EXPRESSION JUSTIFIES CRIMINALIZATION OF THE SYMBOLIC FLAGBURNING IN THIS CASE

Texas offers two rationales to justify the restriction of Johnson's First Amendment rights: preservation of the flag as a symbol of nationhood and national unity, and avoidance of breaches of the peace. Each of these asserted state interests fails to justify §42.09's restriction of symbolic expression.

A. The State Cannot Promote Its Interest In Preserving The Flag As A Symbol of National Unity By Prohibiting Symbolic Dissent

The main rationale Texas puts forward in support of §42.09 is that the State's interest in protecting the flag as a symbol of national unity outweighs Johnson's rights under the First Amendment to make forceful and pointed criticism of the national administration by burning a flag.

Pet. Br. at 19-30; WLF Br. at 6-12. The State characterizes the flag as a symbol so cherished that it can be made sacrosanct. But as this Court has repeatedly held, the State cannot force respect for national symbols, especially through the coercive power of the criminal law.

Justice Jackson's opinion in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), quoted countless times over half a century, is one of the most important statements of our American ideal of individual self-accountability in matters of patriotic faith:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642.

Writing in the middle of the Second World War, Justice Jackson strove to retain an impartial constitutional perspective:

> The case is made difficult not because the principles of its decision are obscure, but because the flag involved is our own . . . .
>
> But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Id. at 641-2.

The State's contention that the principles of Barnette do not apply in this case is based on a distinction between forcing respect and forbidding disrespect. Pet. Br. at 24-27. That distinction was rejected by this Court in Street when it held that the appellant could not constitutionally be punished for the statement "we don't need no damn flag." 394 U.S. at 593. The Court in Street specifically relied on

Barnette when it established that the constitution protects the right to express contempt for the flag, as well as the freedom not to express respect. Id., quoting Barnette at 641-42. See also Goguen, 415 U.S. at 589 (White, J., concurring).

The State's argument in this case boils down to the claim that its use of the flag as a political symbol is more important than respondent's use of the flag as a political symbol. In our system of government, however, that judgment must be made in the marketplace of ideas and not through the forcible suppression of one political viewpoint in favor of another. Just as the State of New Hampshire could not force its citizens to pay homage to the political slogan "Live Free or Die," Wooley v. Maynard, 430 U.S. 705 (1977), the State of Texas cannot force its citizens to pay hom-

age to "venerated objects" designated by statute. As Justice Brandeis recognized years ago, the answer lies in more speech, not "enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring).

Furthermore, because the State in this case is attempting to reserve the use of the flag for its own patriotic purposes, it cannot rely on the diminished scrutiny applied in United States v. O'Brien, 391 U.S. 367 (1968), to justify §42.09 either on its face or as applied to respondent. The government interest asserted in O'Brien -- to ensure the effective administration of the Selective Service system -- did not depend on the symbolism of the regulated draft cards. In contrast, the State's interest in preserving the flag as a symbol of national unity is to suppress opposing

political views like those expressed by Johnson in this case. When the State's object is to control a form of expression, its chosen means must be subjected to the strictest First Amendment scrutiny, and the relaxed standard of O'Brien is wholly inappropriate. Under strict scrutiny, the State's attempt to justify §42.09 as a means of monopolizing the flag's expressive power is constitutionally insufficient. See Spence, 418 U.S. at 415 n.8; Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv.L.Rev. 1482, 1503 (1975).9/

9/ The only interest unrelated to expression that the State offers in support of the statute is its interest in preserving the peace, but as already noted, supra n.4, the State takes the position that no breach of the peace need in fact be threatened for §42.09 to apply.

Even if the State's interest in preserving the flag as a symbol of nationhood were a legitimate interest unrelated to the suppression of expression, there is no basis upon which this Court can conclude that burning the flag undermines that interest. Cf. Tinker, 393 U.S. at 508. It is because the flag is such a powerful symbol that people choose to burn it to express dissent. Far from diminishing the flag's symbolic value, such politically expressive flagburning is a reminder of the freedom this country affords its political dissidents.

B. Section 42.09 Is Not Narrowly Tailored To Serve The State's Interest In Preventing Breaches Of The Peace

The State's interest in preventing breaches of the peace, while legitimate in the abstract, neither justifies the statute's explicit focus on the content of the

proscribed speech, nor deprives the symbolic flagburning in this case of its protected status.

Only two categories of speech restrictions have been deemed by this Court to be constitutionally unprotected in the name of keeping the peace. The Texas statute does not fall within the first such category, restrictions on "fighting words," because it does not proscribe only expression that has "a direct tendency to cause acts of violence by the person to whom, individually, the [expression] is addressed." Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942)(emphasis added). The "fighting words" exception is not available when the expression sought to be proscribed is not "directed at the person of the hearer." Cohen, 403 U.S. at 21, quoting Cantwell v. Connecticut, 310 U.S. 296, 309 (1940).

The statute is also not limited to the kind of speech unprotected under Brandenburg v. Ohio, 395 U.S. 444 (1969). As definitively construed by the Texas court, the statute prohibits more than Brandenburg allows: "One cannot equate 'serious offense' with incitement to breach the peace." 755 S.W.2d at 96. The Court of Criminal Appeals correctly applied the Brandenburg standard when it reversed Johnson's conviction on the ground that "there was no breach of the peace, nor does the record reflect that the situation was potentially explosive." Id. at 95-6. Because §42.09 is not limited to restricting expression that is both "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action," Brandenburg, 395 U.S. at 447, it is not narrowly tailored to serve the

State's asserted interest in avoiding breaches of the peace.

To uphold a restriction on communication because it might lead to violence by those offended by it is to invite the majority to silence those with unpopular views. This Court has long rejected that invitation. See e.g., Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949); Coates v. Cincinnati, 402 U.S. 611, 616 (1971).

IV. SECTION 42.09 IS UNCONSTITUTIONALLY VAGUE

If §42.09 forbade all flagburning, it might have run counter to federal laws encouraging flagburning as a respectful way to dispose of old flags, 36 U.S.C. §176(k), but at least it would have been clear. Instead, the Texas statute forbids only desecration of a flag "in a way that the actor knows will seriously offend one or

more persons likely to observe or discover his action."

Because the criminal consequences of burning a flag thus depend on the degree of reverence or offensiveness with which it is done, "men of common intelligence" must guess when burning a flag might subject them to criminal sanction under §42.09. See Goguen, 415 U.S. at 574, quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1932). Faced with such uncertainty, persons who would use the flag to convey a message will be chilled by the fear of criminal sanctions. See Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

Even more constitutionally problematic than the statute's failure to give clear notice is that its vagueness gives the police and prosecutors wide discretion to punish those whose views they do not like,

as they did here, and to tolerate the actions of others. See Kolender v. Lawson, 461 U.S. 352, 358 (1983); Goguen, 415 U.S. at 574. The language of the Texas statute, like that of the Massachusetts statute struck down in Goguen, is "so indefinite that the police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." Goguen, 415 U.S. at 578.

V. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

The Court granted certiorari on the question whether the public burning of an American flag constitutes free speech subject to the protection of the First Amendment, but this case is an inappropriate vehicle for resolution of that question. Johnson's conviction for flagburning was obtained under a statute which on its face

depends on the reactions of observers to the proscribed conduct. The statute is therefore content-based and must be struck down regardless of whether burning a flag in political protest is protected by the First Amendment. Because such a resolution of this case would not decide the question to which the writ of certiorari was addressed, the writ should be dismissed as improvidently granted.

CONCLUSION

It is ironic that the following inscription to the Confederacy appears in front of the Texas State Capitol:

> THE PEOPLE OF THE SOUTH, ANIMATED BY THE SPIRIT OF 1776, TO PRESERVE THEIR RIGHTS, WITHDREW FROM THE FEDERAL COMPACT IN 1861. THE NORTH RESORTED TO COERCION. THE SOUTH, AGAINST OVERWHELMING NUMBERS AND RESOURCES, FOUGHT UNTIL EXHAUSTED.

Not everyone in Texas or in the United States takes quite that romantic a view of the Civil War. But the First Amendment protects the rights of Texans to express this idea of national disunity. It protects equally the right of Gregory Johnson to do what he did in this case.

The judgment below should be affirmed. Alternatively, the writ of certiorari

should be dismissed as improvidently granted.

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—v.—

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Jasper Johns, Robert Rauschenberg, Claes Oldenburg, Paul Conrad, Coosje van Bruggen, Mark DiSuvero, Hans Haacke, Irving Petlin, Faith Ringgold, Jenny Holzer, Michael Glier, Nancy Spero, Leon Golub, Sol LeWitt, Carl Andre and Jon Hendricks submit this brief as *amici curiae* in support of respondent. The parties to this action have given their written consent to the filing of this brief pursuant to Rule 36.2 of the

Rules of this Court. The letters of consent have been filed with the Clerk.

INTEREST OF THE *AMICI*

The *amici curiae* are renowned artists and one Pulitzer Prize winning editorial cartoonist. The artists' work—sculpture, paintings, constructions, prints, performances—collectively represents the major artistic movements since the 1940's: Abstract Expressionism, Minimalism, Pop Art, Conceptual Art, Performance Art, Political Art, and Feminist Art. Works of these artists are parts of the permanent collections of major museums in the United States and abroad, and all *amici* have exhibited, singly and in group shows, in museums throughout the world. Several have been American representatives to the Venice Biennale, most have participated in one or more Documenta International Exhibitions in Kassel, West Germany, and nearly all have exhibited in the Biennale at the Whitney Museum of American Art. In addition, several have received major fellowships and awards.

Many of the *amici* have used flags in their work. Two of them, Faith Ringgold and Jon Hendricks, were convicted of violating New York's flag desecration statute when they organized a 1970 exhibition of works using the American flag. The works of several other *amici* were shown in that exhibition.

The work of an artist is, obviously, meant to be seen. Artists do not usually communicate through words, but reach their audiences through the use of symbols and recognized images. Elimination of any particular "tool of the trade," as does the Texas statute at issue, necessarily limits the visual vocabulary and stifles the creative process. Accordingly, the *amici curiae* share an intense concern that a government not be permitted to bar or to impose criminal penalties for expression through use of a flag or its image, without advancing the most compelling reasons for doing so.

SUMMARY OF ARGUMENT

Tex. Penal Code Ann. § 42.09 (Vernon 1974) makes it an offense to deface, damage, or otherwise physically mistreat a national flag, knowing that at least one person might be seriously offended by the action. *Amici* contend that the statute violates the First and Fourteenth Amendments because it is vague, overbroad, and not justified by any compelling interest.

1. Due process requires that people not be required to guess at the meaning of a statute, especially a criminal statute. Yet several of the terms of Section 42.09—"seriously offend," "national flag," and "deface, damage, or physically mistreat"—are vague and require such guesswork.

In particular, the "seriously offend" standard is so subjective that it is, in effect, no standard at all. Because "flag" is nowhere defined in the Texas Penal Code, an artist could reasonably conclude that the statute applies not only to three-dimensional flags that might be used in a construction or sculpture, but also to any depiction of a flag on paper or canvas. "Deface, damage, or otherwise physically mistreat," are similarly vague, especially when considered in light of the undefined "flag." The result is that an artist seeking to avoid prosecution is likely to censor his own work and forgo otherwise protected expression.

Because its essential terms are so vague, Section 42.09 neither sufficiently describes the prohibited conduct nor provides guidance about how the provision should be interpreted. The enforcement of the statute is left, therefore, to the personal interpretations of various law enforcement officers, juries, and judges, a result contrary to the Fourteenth Amendment's due process requirements for a criminal statute.

2.A. The Texas flag desecration statute is overbroad because it reaches the clearly protected expression of an artist who employs a flag or the image of a flag. *See, e.g.*, Appendix to this brief ("App.") and material lodged with the Clerk (*see* note 4, *infra*); *see also* Petition for a Writ of Certiorari, Exhibits

A-J, *Long Island Vietnam Moratorium Committee* v. *Cahn*, No. 69-709 (U.S. S.Ct. filed Sept. 16, 1970).

B. Section 42.09 is content-based because, first, as applied to artistic work, the requirement that the proscribed act seriously offend someone necessarily implicates the expressive element of the work, and, second, one of petitioner's rationales for the statute—promoting nationhood and unity—is directly related to expression. *Spence* v. *Washington*, 418 U.S. 405, 414 & n.8 (1974).

C. Because Section 42.09 is content-based, it must be scrutinized closely and can be sustained only if a compelling interest justifies abridgement of free speech. Neither interest petitioner advances—preventing breaches of the peace and promoting nationhood and unity—meets that exacting test.

Petitioner claims that the statute is a measure to prevent breaches of the peace. First, any such purpose justifies interference with protected speech only if limited to conduct likely to produce a clear and present danger. Section 42.09 is not so restricted; it goes well beyond clear and present danger or incitement to include even those quietly displeased—even when not in public. Applied to artistic work, the statute is inapt as a measure for preventing a breach of the peace because such work is often not displayed where those likely to be offended will see it. Second, the facts of this case belie petitioner's law enforcement rationale. After a demonstration that allegedly included acts of destruction and theft of property, petitioner prosecuted no one for any conduct except flag desecration.

Petitioner also claims that the statute is necessary to promote nationhood and unity, but advances no reason to explain how Section 42.09 promotes those interests. Any explanation must be based, however, on the false premise that the nation and its symbol, the flag, are identical and thus harm to a flag is tantamount to harm to the nation. Yet, while this Court has recognized that free speech might yield to the interest of national security under some special circumstances, petitioner cannot seriously claim that an artist's use of a flag in an unorthodox

fashion threatens the nation as would, for example, the truthful report of troop movements during wartime.

ARGUMENT

I

THE VAGUENESS OF THE TEXAS FLAG DESECRATION STATUTE VIOLATES THE FOURTEENTH AMENDMENT

Tex. Penal Code Ann. § 42.09 (Vernon 1974) ("Section 42.09" or "the flag desecration statute" or "statute") states in pertinent part:

> Desecration of Venerated Object
>
> (a) A person commits an offense if he intentionally or knowingly desecrates:
>
> • • • •
>
> (3) a state or national flag.
>
> (b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
>
> (c) An offense under this section is a Class A misdemeanor.[1]

Thus, an individual violates Section 42.09 if he consciously defaces, damages, or otherwise physically mistreats a state or national flag and is aware that one or more persons likely to observe or discover his action is likely to be seriously offended.

The flag desecration statute violates the Fourteenth Amendment because several of its elements, as interpreted by the Texas courts, are so vague that they provide no standard for determining what conduct is proscribed. *Boos* v. *Barry*, 108 S.Ct. 1157, 1164 (1988); *Hustler Magazine* v. *Falwell*, 108 S.Ct. 876, 881-

1 "Intentionally" and "knowingly" are defined in Tex. Penal Code § 6.03(a) and (b) respectively.

882 (1988); *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974); *Gooding* v. *Wilson*, 405 U.S. 518, 527 (1972); *Cohen* v. *California*, 403 U.S. 15, 25 (1971); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971). In particular, the terms "seriously offend", "national flag" (assuming in this case that it refers to the flag of the United States of America), and "deface, damage, or otherwise physically mistreat", read either alone or together with other elements, are not sufficiently clear to give the requisite constitutional notice of what conduct is permitted and to provide adequate guidance to law enforcement officers so as to prevent arbitrary and discriminatory enforcement. *Goguen*, 415 U.S. at 572-573, 574-576.

Moreover, the inadequacies of the statute weigh particularly heavily upon those like *amici* whose expression often consists of symbols and well-known pictorial devices (such as a flag) and whose creative efforts are not interpreted alike by everyone. Or, to modify *Goguen* slightly, " '[w]hat is [offensive] to one man may be a work of art to another.' "[2] People of common intelligence should not be required to guess at the meaning of a statute, especially a criminal statute (*Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926)), nor should the creative process suffer from the inhibition that such guesswork demands. Yet the vagueness of the Texas flag desecration statute demands exactly such guesswork.[3]

A. To "Seriously Offend One Or More Persons Likely To Observe Or Discover His Action" Is An Unascertainable Standard.

Section 42.09 only proscribes conduct that "the actor knows will seriously offend one or more persons likely to observe or

2 *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974), quoting Note, *Constitutional Law, Freedom of Speech, Decoration of National Symbols of Protected Political Expressions*, 66 Mich. L. Rev. 1040, 1056 (1968); *see Winters* v. *New York*, 333 U.S. 507, 510 (1948).

3 Even if the Court were to determine that Section 42.09 is not vague as applied to respondent's conduct, it may still address *amici*'s vagueness argument. *New York State Club Assn., Inc.* v. *City of New York*, 108 S.Ct. 2225, 2233 (1988); *Goguen* v. *Smith*, 471 F.2d 88, 91-92 & n.7 (1st Cir. 1972), *aff'd*, 415 U.S. 566 (1974).

discover his action." "Offend" means "to cause pain to", "to cause to feel vexed or resentful: hurt the feelings of", and its synonyms are "affront", "insult", and "outrage." Webster's Third New International Dictionary 1566 (Springfield, Mass.: G & C Merriam Co. 1981) ("Webster's"). Thus, a person is subject to prosecution under the statute if his treatment of a flag is likely seriously to vex or to affront even one person.

This is precisely the kind of vague standard condemned in *Goguen*, *Coates*, *Hustler*, *Boos*, *Gooding*, and *Cohen*. It is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates*, 402 U.S. at 612, 614 (finding vague an ordinance prohibiting conduct "annoying to persons passing by"); *Hustler*, 108 S.Ct. at 882 (in a civil action, " '[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression"); *Boos*, 108 S.Ct. at 1164 (holding that the interest in protecting the "dignity of foreign diplomatic personnel," like the "outrageous" standard rejected in *Hustler*, is too inherently subjective); *Goguen*, 415 U.S. at 578 (holding "treats contemptuously" vague); *Gooding*, 405 U.S. at 527 ("tending to a breach of the peace" leaves wide open the standard of responsibility); *Cohen*, 403 U.S. at 25 (statute proscribing "offensive conduct" may not be used to proscribe particular words; "one man's vulgarity is another's lyric").

No one could predict with any confidence what expressive conduct involving a flag would be likely to seriously offend at least one other individual. For many people, such as the officers who testified at respondent's trial, conduct they deem disrespectful of the flag will seriously offend them. Indeed, it is likely that for many people, any unconventional or nontraditional depiction of the flag—however favorable to the flag and the nation—might seem disrespectful or in bad taste and thus offensive.

So, for example, Paul Conrad's political cartoon that illustrates "The American Way of Death" by depicting a razor blade cutting lines of cocaine upon a flag (App. 10a) could seriously offend someone who believes that it is disrespectful to associate illegal drugs with the flag. Another person might be seriously offended by a depiction of the flag in which the stars in the union are represented by photographs of well-known Hollywood personalities such as Mickey Mouse, Johnny Carson, and Elizabeth Taylor. *See* K. Hinrichs, Stars & Stripes 98 (San Francisco: Chronicle Books 1987).[4] Similarly, the paintings of Jasper Johns (App.3a, 9a), which use the flag because it is a recognizable image, could seriously offend someone who thinks that using the flag as an object in an artistic work is inappropriate.

The "seriously offend" standard of the Texas statute is no standard at all because it is subject to the particular tastes, views, or whims of different individuals. *Coates*, 402 U.S. at 614. It depends—as do "offensive", "outrageous", or "affronting dignity"—solely upon the reactions of third parties, a test so amorphous that an artist wishing to avoid prosecution would have to censor his work to the point of virtually forgoing the use of a flag. Moreover, such a standard, as in *Hustler*, allows a jury to impose liability on the basis of the jurors' tastes or views. These vices, both of which inhere in the Texas flag desecration statute, are incompatible with the protections of the Due Process Clause.

B. What Is A Flag?

At first blush, the question "what is a flag?" in the context of a flag desecration statute might seem odd. But in a day when people rise before major league baseball games to The Star Spangled Banner and salute a two-dimensional representation of the flag projected upon a giant video screen or light board

4 Copies of K. Hinrichs, Stars & Stripes 3 (San Francisco: Chronicle Books 1987) (interpretations of the flag by 96 illustrators and graphic artists "asked to interpret one of the world's most charged symbols") have been lodged with the Clerk of the Court.

and "in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it" (*Goguen*, 415 U.S. at 574), the question is not at all frivolous, especially when an artist depicting a flag could be subject to criminal liability depending upon the answer.

The determination of the meaning of the term "flag" in Section 42.09 is bound up with the issue of what a flag is in general, whether it symbolizes something, and why the United States flag has become so venerated that desecration is penalized. Thus, before turning directly to the particular language of the Texas flag desecration statute, it is worthwhile considering the role of the United States flag as a symbol.

1. "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *Board of Education* v. *Barnette*, 319 U.S. 624, 632 (1943). "Such a primary symbol, likely to be recognized by all who see it, speaks when it is placed in odd positions, conjoined with symbols or words, or made the butt of grimaces, speech or gestures." *Goguen* v. *Smith*, 471 F.2d 88, 99 (1st Cir. 1972).

The strength of the stars and stripes as a potent, often moving, symbol of America cannot be disputed. We are a nation that pledges allegiance first "to the Flag" and then "to the Republic for which it stands." 36 U.S.C. § 172. The flag does not, however, necessarily symbolize a particular point of view, nor even always the unity of the nation. "It belongs as much to the defeated political party, presumably opposed to the government, as it does to the victorious one. Sometimes the flag represents government. Sometimes it may represent oppostion to government. Always it represents America—in all its marvelous diversity." *Parker* v. *Morgan*, 322 F. Supp. 585, 588 (W.D.N.C. 1971) (three-judge court).

Because the flag is so powerful a symbol of the nation, it is at times mistaken for the nation. 36 U.S.C. § 176(j) ("The flag

represents a living country and is itself considered a living thing"). However the flag's referent, the country or nation, exists apart from the symbol. Its strength depends upon the strength of the principles it represents, not upon the expressive "misuse" of some particular flag which symbolizes it. As with any symbol, the flag continues to serve its symbolic function even if one flag, one representation of the symbol, is destroyed. In other words, a change in the physical character of one flag—any flag—does not "interfere with its design and function." *Goguen*, 415 U.S. at 587 (White, J., concurring).

For this reason, flags cannot properly be compared to the Lincoln Memorial. *Goguen*, 415 U.S. at 587 (White, J., concurring). Although the Lincoln Memorial is an awe-inspiring symbol of freedom, especially racial freedom, Congress is empowered to protect the integrity of the physical monument not because it is a symbol, but because it is public property. Similarly, Congress is empowered to make laws protecting particular flags owned by the government, because, in addition to their symbolic function, they are the government's tangible property. However, *amici* contend that any law aimed at preventing the use of a replica of the Lincoln Memorial, or a depiction of it, as part of symbolic expression would suffer the same infirmities as does the Texas flag desecration statute.

2. "From its earliest days, the art and literature of our country have assigned a special place to the flag of the United States." 415 U.S. at 601 (Rehnquist, J., dissenting). As the Appendix to this Brief, the material lodged with the Clerk, and the examples noted by Justice Rehnquist (*id.*) illustrate, the history of the United States is rich with pictorial representations of the flag. This includes work in the fine arts, graphic arts, the art of the editorial cartoonist, and the decorative art of early America. *See also* Petition for a Writ of Certiorari, Exhibits A-J, *Long Island Vietnam Moratorium Committee* v. *Cahn*, No. 69-709 (U.S. S.Ct., filed Sept. 16, 1970).

In some of these contexts, the flag has been used as a symbol for the United States, sometimes to express positive sentiments, sometimes not. In other contexts, however, the flag has served

simply as a well-known device that permitted the artist to express other ideas.[5] Whatever its use, however, it has served as a vehicle of artistic expression.

3. Against this background concerning the use of flags and the American flag as a symbol or artistic device, we turn to the meaning of "flag" in Section 42.09. "Flag" is defined nowhere in the Texas Penal Code. Given the enormous versatility of flags in artistic expression, this statutory gap presents serious problems for an artist seeking to avoid prosecution. The statutory language "a national flag," which uses the indefinite article, implies that the statute applies to the flag of any nation, and not only a United States flag.[6] Assuming for argument that the statute applies only to the national flag of the United States, the statutory language gives no guidance about whether "flag" refers only to three-dimensional flags of the sort usually hung from a standard or also includes two-dimensional depictions in paintings, posters, or sewn into quilts. The statute does not even indicate whether it extends to all flags the United States has ever had or only to the one currently in force. *See Goguen*, 415 U.S. at 570 n.3, 578-579 & n.24. For those, like artists, playwrights, editorial cartoonists, and movie makers, whose expressive vocabulary is dependent upon visual symbols and devices, this is not an academic inquiry.[7]

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5 *See* Museum of Modern Art, Sixteen Americans 22-27 (New York 1959); *see also* H. Rosenberg, *Jasper Johns: "Things the Mind Already Knows"*, The Anxious Object 177 & n.* (Chicago: The University of Chicago Press 1966) (" 'I went on [from the American flag] to similiar things like targets, things the mind already knows, that gave me room to work on other levels' "); H. Rosenberg, *Twenty Years of Jasper Johns*, Art and Other Serious Matters, 132, 134 (Chicago: The University of Chicago Press 1985).

6 Because we believe that the statute is defective as applied to the United States flag, we do not elaborate on this point. We do wonder, however, what interest petitioner has in protecting the flag of a foreign nation such as Iran or Libya.

7 Even if the statute were intended to include only three-dimensional flags, it would have a particularly harmful impact upon those artists—sculptors, actors, movie directors—whose artistic expression is necessarily three-dimensional.

One Texas case interpreting "flag" holds that the statute applies "just as forcefully whether the object burned is an actual flag or is an imitation so similar that persons viewing the scene would not be aware of the difference." *Deeds* v. *Texas*, 474 S.W.2d 718, 721 (Tex. Crim. App. 1971).[8] Although that court's use of the word "object" suggests a three-dimensional flag, the remainder of its holding could support the inference that the statute reaches an artist's two-dimensional depiction as well.

One seeking guidance might logically consult the United States Code to find the definition of the United States flag. The federal flag desecration statute supports the conclusion that the reach of the word "flag" could encompass nearly any configuration of stars and stripes—two- or three-dimensional—that the average person might think is a flag or a picture of a flag. 18 U.S.C. § 700.[9] There is nothing in the Texas flag desecration statute or any legislative history that dispels the ambiguity

8 *See Goguen*, 415 U.S. at 578-579 & n.24 regarding the "ambiguities presented by the concept of an 'actual' flag." Although Goguen argued that the flag sewn to the seat of his pants was not a flag within the meaning of the statute, the Massachusetts Supreme Court disagreed. *Id.* at 579 n.24.

9 18 U.S.C. § 700(b) provides that the flag of the United States

> shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

See Parker v. *Morgan*, 322 F. Supp. 585, 588 (W.D.N.C. 1971) (three-judge court) ("The definition of a flag in the North Carolina statute is simply unbelievable * * * Read literally, it may be dangerous in North Carolina to possess anything red, white and blue. Such a definition is a manifest absurdity"); *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344, 347-348 (2d Cir. 1970), *aff'd*, 418 U.S. 906 (1974).

about whether the statute also encompasses depictions of a flag.[10]

It is impossible to reach a definitive conclusion about the meaning of "a national flag" in the Texas flag desecration statute. Therefore, as with the meaning of "seriously offend," an artist wishing to avoid the statute's sanctions would be forced to guess about the scope of the statutory terms. Rather than run the risk of prosecution, an artist operating under such an unclear statute is likely to forgo protected expression. A statute that provokes such a response is impermissibly vague.

C. "Deface, Damage, Or Otherwise Physically Mistreat"

The portion of Section 42.09 that purports to define the proscribed conduct, especially when read with the undefined "a national flag," is similarly vague.

The use of the phrase "otherwise physically" may suggest that all three verbs describing the proscribed conduct are related and that they refer only to three-dimensional objects. This conclusion is at odds, however, with the definitions of the three verbs. "Deface" means to "destroy or mar the face or external appearance of" something (Webster's at 590), and "damage" means "to hurt, injure, [or] impair" something (*id.* at 571). Both of these definitions just as easily contemplate works of art involving two-dimensional depictions of flags as they do three-dimensional flags. They could include a flag drawn with a tear as a metaphor for the condition of the country (App. 6a) or a flag that intersperses recognizable parts of the flag's design with other images or designs (App. 5a). "Mistreat" means "to treat badly: abuse." *Id.* at 1446. Given these definitions, Vito Acconci's "Instant House", whose interior walls are United States flags with windows and doors cut through (App. 20a), or

10 If Section 42.09 reaches only three-dimensional flags, then burning a flag as respondent did would be proscribed, but the photograph or sketch on the cover of a magazine of the same flag burning would not. *See Korn* v. *Elkins*, 317 F. Supp. 138, 142-143 (D. Md. 1970) (three-judge court) (holding unconstitutional the Maryland flag desecration statute as applied to the cover of a university magazine that depicted a burning American flag).

a flag painted on a man's face or on a nineteenth century farm gate (App. 4a, 8a) could constitute desecration under Section 42.09.[11]

Moreover, "mistreat," like the word "abuse" that defines it, implies a standard of acceptable treatment. Thus, a police officer might conclude that violation of one of the rules and patriotic customs pertaining to the display and use of the flag (36 U.S.C. §§ 174-176) was physical mistreatment, chargeable as flag desecration, even though those rules by themselves carry no penalties. *See Hoffman* v. *United States*, 445 F.2d 226, 230 (D.C. Cir. 1971) (MacKinnon, J., concurring). For example, superimposing figures on the bleeding flag (App. 18a), contrary to custom (36 U.S.C. § 176(g)), could constitute defacement or physical mistreatment which, if it seriously offended someone who saw it, would fall within the statute.

As demonstrated, the language of Section 42.09 is so vague that the actor cannot know what conduct is proscribed. The enforcement of the statute is therefore left to the personal interpretation of law enforcement officers, judges, and juries, a result repugnant to the Fourteenth Amendment, which should not be sanctioned.

II.

THE TEXAS FLAG DESECRATION STATUTE IS OVERBROAD AND THUS VIOLATIVE OF THE FIRST AMENDMENT

A. Section 42.09 Reaches Protected Artistic Expression

A statute is overbroad if it sweeps into its orbit a wide variety of activity protected by the First Amendment. *Boos*, 108 S.Ct.

11 *See Goguen*, 415 U.S. at 570 n.4, quoting 471 F.2d at 91 n.4, where, speculating about why Goguen was not charged with any act of "physical desecration," this Court acknowledged the difficulty of applying the statutory terms "mutilates, tramples upon [and] defaces" and observed " 'we are not so sure that sewing a flag to a background clearly affects "physical integrity" ' ").

at 1168.[12] No one can seriously contest the proposition that an artist's work—whether it employs a two- or three-dimensional flag, whether it employs it as a symbol of the nation or simply as a well-recognized device (*see*, note 5, *supra*), and whether or not it is intended to have political connotations—is work "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[ ]." *Spence* v. *Washington*, 418 U.S. 405, 409 (1974).

"The Court for decades has recognized the communicative connotations of the use of flags", including the United States flag (*Spence*, 418 U.S. at 410, citing *Stromberg* v. *California*, 283 U.S. 359 (1931), and *Barnette*, 319 U.S. at 632); it has also acknowledged the use of the United States flag in the country's art history (*Goguen*, 415 U.S. at 601-602 (Rehnquist, J., dissenting)).[13] And, to the extent that some works of art fall into the category of "protest art" they follow in an "established artistic tradition . . . exemplified by the works of such artists as Michelangelo, Goya and Picasso." *People* v. *Radich*, 26 N.Y.2d 114, 126, 308 N.Y.S.2d 846, 855, 257 N.E.2d 30, 37 (1970), (Fuld, J., dissenting), *aff'd by an equally divided Court*, 401 U.S. 531 (1971); *United States ex rel. Radich* v. *Criminal Ct. of New York*, 385 F. Supp. 165, 168 (S.D.N.Y. 1974).

Section 42.09, given the vagueness of its terms, could sweep within its ambit nearly all the artistic creations that have ever used or depicted a flag. It would include Jasper Johns's paintings of flags (*see*, *e.g.*, "Three Flags" (App. 3a), "Morato-

12 In making this assessment, the vagueness of the statute, because it lends itself to a broader statutory reach, "affects overbreadth analysis." *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.6 (1982).

13 The Court has also recognized the use of other flags as a symbol of opposition. *See*, *e.g.*, *Stromberg* v. *California*, 283 U.S. 359 (1931) (red flag displayed as symbol of opposition to organized government). In different contexts, artists have made eloquent statements using the flag of various nations as forms of protest. *See*, *e.g.*, John Heartfield's powerful use of the flag of Nazi Germany (App. 23a) or Hans Haacke's "Apartheid" which makes use of the flags of both the African National Congress and the Republic of South Africa on the same standard, the former flying freely and the latter knotted (App. 22a).

rium" (App. 11a), and "White Flag" (App. 9a)); Claes Oldenburg's "Heel Flag" (App. 13a); political cartoons of Herblock (App. 7a, 19a) and Paul Conrad (App. 10a); Faith Ringgold's "Flag for the Moon—Die Nigger" (App. 15a) and "The Flag is Bleeding" (App. 18a) and the artistic constructions that were at issue in *Radich*, 385 F. Supp. at 168.

The statute would similarly encompass much of the work of any art exhibition devoted to the use of the flag such as the 1970 "The People's Flag Show" at the Judson Memorial Church in Manhattan;[14] "Stars and Stripes," organized by the San Francisco chapter of the American Institute of Graphic Arts to coincide with the 100th anniversary of the Statue of Liberty;[15] or the 1988 exhibit in Rotterdam of fifty artists' flags.[16]

The reach of the Texas flag desecration statute is not limited to fine artists or editorial cartoonists. It is equally likely to encompass the work of a movie actor burning a flag in a movie about the student antiwar protests of the 1960's. *See Schacht* v. *United States*, 398 U.S. 58, 60 (1970) (holding unconstitutional penal statutes that authorized the wearing of a United States military uniform in a theatrical production, but only "if the portrayal does not tend to discredit that armed force").

Moreover, the fear of prosecution is not speculative. Artists and their dealers have been prosecuted for using the flag in their works despite their clearly expressive intent.[17] The inescapable

14 *See Hendricks* v. *Hogan*, 324 F. Supp. 1277, 1279-1280 (S.D.N.Y. 1971); The Village Voice, Nov. 19, 1970, at 1, 20-21; App. 24a.

15 *See* K. Hinrichs, note 4, *supra*.

16 Gran Pavese, The Flag Project: 50 Artists/50 Flags (The Hague, The Netherlands: SDU Publishers 1988), including those flags reproduced at App. 5a, 22a.

17 *See, e.g.*, *People* v. *Radich*, 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970), *aff'd by an equally divided Court*, 401 U.S. 531 (1971); *United States ex rel. Radich* v. *Criminal Ct. of New York*, 385 F. Supp. 165, 168 (S.D.N.Y. 1974) (holding unconstitutional statute under which art gallery dealer was convicted for exhibiting three constructions using the flag); *People* v. *Keough*, 31 N.Y.2d 281, 338 N.Y.S.2d 618, *rev'g on nonconstitutional grounds* 38 A.D.2d 293, 329 N.Y.S.2d 80 (1972); *People* v. *Hendricks*, Crim. No. B36653 (N.Y. Crim. 1971) (convicting two of the *amici*), and *Hendricks* v. *Hogan*, 324 F. Supp. 1277, 1280 (S.D.N.Y. 1971) (denying motion to convene three-judge court to preliminarily enjoin state criminal prosecution).

conclusion is that the basis for these prosecutions against artists and their dealers was the personal belief of law enforcement and judicial officials that use of the flag to express unpopular views was, in the terms of the Texas flag desecration statute, "seriously offen[sive]."[18] The reaction of one appellate judge to a photograph created by students for a university publication is an example of just such motivation: "Displaying the flag in this disgusting fashion [partially draping a nude female figure in the flag] . . . dishonored [the flag]. If these defendants have a sincere ideological motive, they should find other means or ways to express it." *People* v. *Keough*, 38 A.D.2d 293, 295; 329 N.Y.2d 80, 82, *rev'd on nonconstitutional grounds*, 31 N.Y.2d 281, 338 N.Y.S.2d 618 (1972).[19]

Because Section 42.09 penalizes uses of a flag in the expression of artists, the statute "sweeps too broadly." *Gooding*, 405 U.S. at 527; *Street* v. *New York*, 394 U.S. 576, 592 (1969).[20]

18 Confirming the conclusion that this and other flag desecration and misuse prosecutions have been brought primarily to censor the expressive content of the conduct is the fact that the vast majority of such cases have arisen in the context of the expression of views hostile to the prevailing political climate. *See Goguen*, 471 F.2d at 102 (admission of government's counsel that a war protestor's use of a flag as a shield from the rain would be prosecuted but the same use by a member of the American Legion would not).

19 Of course, this Court has rejected the notion that First Amendment interests may be abridged on the ground that they may be exercised in some other place or manner. *Spence* v. *Washington*, 418 U.S. 405, 411 n.4 (1974).

20 Because the Texas courts held, and petitioner has never challenged, that respondent's act of burning the flag was protected speech within the First Amendment, then, for the reasons described in Parts II.B and II.C of this brief, the Texas flag desecration statute also violates the First Amendment as applied to respondent's conduct.

B. Section 42.09 Is Content-Based Legislation

When expression involves conduct rather than "pure speech," then, as then-Judge Scalia has observed, whether the First Amendment is implicated depends upon "the threshold inquiry of whether the purpose of the law is to suppress communication. • • • [I]f so, the court *then* proceeds to determine whether there is substantial justification for the proscription, just as it does in free-speech cases." *Community for Creative Non-Violence* v. *Watt*, 703 F.2d 586, 623, 625 & n.18 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd*, 468 U.S. 288 (1984) ("*CCNV*"); *Spence*, 418 U.S. at 414 n.8; *Kime* v. *United States*, 459 U.S. 949, 952-953 (1982) (Brennan, J., dissenting from denial of certiorari).

Section 42.09 is content-based, despite petitioner's claims to the contrary (Br. 39), first because it proscribes only those works that the actor knows will seriously offend at least one person who observes them. Therefore, the artist is penalized not solely for his conduct, but for the expression embodied in the work. Justice White has already stated why such a result is impermissible.

> To convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature.

Goguen, 415 U.S. at 588 (White, J., concurring); *see Schacht*, 398 U.S. at 93; *Kime*, 459 U.S. at 956 (Brennan, J., dissenting from denial of certiorari); *Hustler*, 108 S.Ct. at 882; *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection").[21]

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21 Moreover, even if *Bachellar* v. *Maryland*, 397 U.S. 564, 570-71 (1970), did not bar petitioner's argument that the Court could save the statute by deleting the "seriously offend" language (Br. 48-50), *amici* contend that the Texas flag desecration statute would still be content-based. "The *only* reason [to regulate the display and use of the] United States flag [is] related to the communicative content of the flag." *Community for Creative Non-Violence* v. *Watt*, 703 F.2d 586, 625 (D.C. Cir. 1983) (emphasis added) (Scalia, J., dissenting), *rev'd*, 468 U.S. 288 (1984); *Goguen*, 471 F.2d at 99 ("But when the object is a pure symbol, such as the flag . . . any individualized activity with regard to it [except maintaining and storing one] is bound to convey a message of fealty or revulsion and is 'closely akin to pure speech' ").

Section 42.09 is also content-based because one of petitioner's rationales for the statute—that it promotes nationhood and unity (Br. 24)—"is directly related to expression . . . ." *Spence*, 418 U.S. at 414 & n.8 (if the state's interest is protecting the flag as a symbol of the country "it is directly related to expression" and "the four-step analysis of *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) is inapplicable"); *id.* at 420-421 (Rehnquist, J., dissenting); *Kime*, 459 U.S. at 952-953 (Brennan, J., dissenting); *CCNV*, 703 F.2d at 625 & n.14 (Scalia, J., dissenting).

Petitioner tries to escape the conclusion that the statute is content-based by claiming that it seeks only to protect the flag as a symbol, regardless of the viewpoint expressed, and that the "offended observer" standard favors no particular viewpoint because it is geared to the reactions of third-parties (Br. 20-24, 40, 43-45). The Court was unpersuaded by a similar argument in *Boos*. There a District of Columbia statute forbade picket signs near foreign embassies that tended to bring a foreign government into public odium or public disrepute. 108 S.Ct. at 1162. The government argued that the statute was content-neutral because it was directed at no single ideological position, *i.e.*, whether speech was prohibited in any particular case was determined solely by the policies of the foreign government. 108 S.Ct. at 1162-1163.

This Court rejected the argument. "[A] regulation that 'does not favor either side of a political controversy' is nonetheless impermissible" if it has the effect of proscribing an entire category of speech. *Id.* at 1163.[22] The same applies to Section 42.09

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22 Petitioner's admission that the statute proscribes conduct that is intended to offend (Br. 44) belies its disclaimer that the statute's "serious offense" language is "narrowly tailor[ed]" to separate the actor's intent

which has the effect of eliminating one symbol of enormous emotive force from the artist's expressive vocabulary.

C. Petitioner Advances No Compelling Justification For Its Infringement of Protected Expression

Because Section 42.09 is content-based, it "must be subjected to the most exacting scrutiny." *Boos*, 108 S.Ct. at 1164. Neither of the rationales that petitioner identifies—avoiding breaches of the peace and protecting the flag as a symbol of national unity—qualifies as a sufficiently compelling interest to justify abridgement of free speech.

1. A state's interest in preventing a breach of the peace does not justify interference with protected speech "unless [the speech is] shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). The Texas flag desecration statute does not meet this standard.

In the first place, Section 42.09 is not restricted to conduct likely to produce an imminent breach of the peace. The statute goes far beyond "clear and present danger" or "incitement." It covers those quietly displeased—even when not in public. Petitioner's disorderly conduct statute—which proscribes certain language and gestures if they tend to incite an immediate breach of the breach (Tex. Penal Code § 42.01(a)(1) and (2)—shows that if petitioner intended to proscribe conduct likely to incite an imminent breach of the peace, it was capable of writing a statute aimed at such conduct.[23] Thus, its failure to do so in Section 42.09 confirms that the statute was not intended to be so limited.

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from the reaction of the crowd (*id.*). Justice Brennan's ironic observation about the federal flag desecration statute applies equally here: "This is indeed a narrowly drawn statute; it is drawn so that everything it might possibly prohibit is constitutionally protected expression." *Kime*, 459 U.S. at 954.

23 Nor could Texas claim that the flag burning in this case amounted to "fighting words" in the sense that anyone who witnessed the event would be inherently likely to erupt in violent reaction. *Street* v. *New York*, 394 U.S. 576, 592 (1969); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 574 (1942); *Cohen* v. *California*, 403 U.S. 15, 20 (1971). The witnesses at trial testified that they were offended, but none of them was moved to violence. Furthermore, two of the witnesses who testified that they were offended were police officers, presumably trained not to respond easily to provocations encountered during their work. In addition, the flag burning occurred in the midst of a group of demonstrators who apparently supported the views reflected by respondent's action. In any event, the likelihood was slim that the act of burning the flag would, under the circumstances, provoke anyone to violent conduct.

And, if petitioner's concern is the protection of the public against the danger of fire, it can certainly enact a statute aimed at the burning of any property, not just flags, under circumstances likely to endanger public safety. *See* Tex. Penal Code Ann. § 28.02(a) (Vernon Supp. 1988) relating to the burning of a building, habitation or vehicle.

Indeed, as explained above, this statute is likely to reach the conduct of artists whose work is typically exhibited in circumstances that are unlikely to lead to a breach of the peace, even if an observer is offended by them. For example, the constructions that provoked the arrests in *Radich* were seen from the street by police officers who saw them "displayed in the quiet surroundings of [an] upstairs art gallery on Madison Avenue in midtown Manhattan." 26 N.Y.2d at 127, 308 N.Y.S.2d at 856, 257 N.E.2d at 38 (Fuld, J., dissenting). Thus, petitioner's breach of the peace rationale has little force when applied to much of the artistic work that the statute potentially proscribes. *State* v. *Kool*, 212 N.W.2d 518, 521 (Iowa 1973) (peace symbol on upside down flag held unlikely to provoke breach of peace); *People* v. *Von Rosen*, 13 Ill. 2d 68, 147 N.E.2d 327, 329 (1958) (breach of peace unlikely result of magazine illustration depicting nude woman in hat, sunglasses, and flag covering pubic area).

Moreover, the facts of this case belie petitioner's claim that Section 42.09 is necessary to protect against breaches of the peace. The flag burning at issue here coincided with the 1984 Republican Convention in Dallas and occurred toward the end of a political demonstration dubbed the "Republican War Chest Tour" that took the demonstrators to the headquarters of several corporations to protest the policies of the Reagan

administration and certain Dallas corporations. Undercover police officers accompanied the demonstrators, and uniformed police officers were asssigned to observe the tour. According to petitioner (Br. 3-5), in the course of the tour, potted plants were overturned and uprooted, bank deposit slips were torn up, a flag was stolen, and walls were spray-painted. The tour terminated at the plaza in front of the Dallas City Hall where the flag burning occurred in a circle of protestors, police officers, and some passersby.

So far as the record shows, in the course of this demonstration, no one was arrested for criminal mischief. Tex. Penal Code Ann. § 28.03 (Vernon 1974 and Supp. 1988). No one was arrested for reckless damage or destruction of property. *Id.* at § 28.04. No one was arrested for theft. *Id.* at § 31.03 (Vernon Supp. 1988). The only prosecution arising from this demonstration was for desecration of the American flag. In other words, despite observing several incidents of destruction and theft of property and despite petitioner's concession that the statutes cited above were applicable (Br. 35), the only charge prosecuted—in the interest of preserving the peace—was desecration of the flag.

In the circumstances of this case, to justify Section 42.09 as a measure for preventing breaches of the peace is patently absurd and mocks legitimate and responsible law enforcement. The inescapable conclusion is that petitioner's concern was not preservation of the peace, but penalizing respondent for the particular views he expressed.

Petitioner has advanced no valid reason why its need to protect against breaches of the peace requires abridging expression protected by the First Amendment by means of Section 42.09.

2. Petitioner's other rationale—the need to protect the flag as a symbol of nationhood and unity—fares no better. No one seriously disputes that the federal government has an interest in adopting a flag (4 U.S.C. §§ 1-2), establishing customs for its use (36 U.S.C. §§ 173-178), and ensuring that its use is not claimed exclusively by any one entity (15 U.S.C. § 1052(b) (no trademark can be registered if it "consists of or comprises the

flag . . . of the United States")).[24] However, petitioner advances no reason why the government's interest in the flag should spread any wider.[25]

Though couched in terms of the symbol of the nation, petitioner's argument mistakenly confuses the symbol, the flag, with its referent, the nation, thereby implying that the nation itself is somehow in jeopardy unless the government bars all dissenting and offending uses of the flag. Yet, while the Court has suggested that free speech might yield to the national security under some exceptional circumstances (*see New York Times Co.* v. *United States*, 403 U.S. 713, 723 (1971) (Douglas, J., concurring); *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931)), petitioner cannot claim that an artist's use of the flag in an unorthodox fashion threatens the nation as would the truthful report of troop movements during a time of war.

Petitioner contends that Section 42.09 is necessary in order to ensure that the flag "survive to represent and symbolize this country and its uniqueness as a governmental entity" (Br. 28). Petitioner never explains why Section 42.09 is essential to this result, but implicit in its argument is the view that the flag

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24 Nor does the government's authority to bar a particular entity from having an exclusive trademark in a nation's flag lead to the conclusion that Congress is thereby empowered to bar all expressive use of the flag. *See* Brief of the Washington Legal Foundation et al., *amici curiae*, Supporting Petitioner at 25, relying upon *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 107 S.Ct 971 (1987). The outcome of that case depended in large part upon the holding that the speech at issue was commercial, the effect of the statute was unlikely to reach beyond the parties before the Court, and the United States Olympic Committee was not a governmental actor to which the First Amendment applies. 107 S.Ct. 2980-2981 & n.15, 2983, 2985. The same cannot be said of petitioner's effort to suppress expressive use of the flag.

25 While the interest of the federal government in matters relating to the United States flag is obvious, petitioner's interest is not so clear. *But see Halter* v. *Nebraska*, 205 U.S. 34, 39 (1907); however, *Halter* was decided before the protection of the First Amendment had been extended to commercial speech or to the states through the Fourteenth Amendment. The Court need not resolve this issue, however, because regardless of petitioner's legislating authority, *amici* maintain that petitioner has not advanced a compelling reason for infringing protected speech.

should be identified with the majority view and that nationhood and unity can only be achieved by cutting off any symbolic use of the flag associated with dissent or critical expression. If we take minor liberties with his words, the observation of Justice Jackson still applies:

> To believe that patriotism will not flourish if [the American flag is used symbolically as a form of protest] is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. • • • But freedom to differ is not limited to things that do not matter much.

Barnette, 319 U.S. at 640, 641-642; *see Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 n.8 (1974), quoting Thomas Jefferson's first inaugural address; *see also*, M.B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. 29, 56-57 (1973).

With the same confidence in "the appeal of our institutions to free minds," this Court has also acknowledged "the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." *Street*, 394 U.S. at 576; *Spence*, 418 U.S. at 422 (Rehnquist, J., dissenting).[26] But if nationhood and unity will not be diminished by words spoken against the flag, there is no reason, and petitioner has offered none, why nationhood and unity are any more likely to suffer because the same sentiments are expressed using the flag as a symbol. Indeed, to the extent that people are proud

26 In the libel and related contexts, this Court has recognized that ensuring that public debate shall be "uninhibited, robust and wide-open" requires acceptance of "vehement, caustic, and sometimes unpleasantly sharp attacks" (*New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964)), "offensive" speech (*Hustler Magazine* v. *Falwell*, 108 S.Ct. 876, 882 (1988)), "pernicious opinion" (*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)), and "rhetorical hyperbole" (*Greenbelt Co-op Pub. Assn.* v. *Bresler*, 398 U.S. 6, 14 (1970)). And, to the extent that a flag desecration statute is a guise for restricting criticism of the government, it resembles seditious libel and should be treated similarly. *See Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 153-154 (1967) (plurality).

of, and derive a sense of national unity from, the nation's First Amendment protection of dissenting and contrary views, measures which are used to suppress such views, such as Section 42.09, are themselves likely to weaken those feelings of national pride.

This Court has been vigilant against efforts to censor particular expression, whether specific words (*Cohen*, 403 U.S. at 26), or symbols (*Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 510-511 (1969) (regulation against black armbands only and no other symbol violative of First Amendment)). The rationale for that vigilance is that once government penalizes the use of particular words or symbols because they are deemed offensive, "government might soon seize upon the censorship of particular words [or symbols] as a convenient guise for banning the expression of unpopular views." *Cohen*, 403 U.S. at 26. Although justified as a means of promoting nationhood and unity, Section 42.09 operates as "a convenient guise" for censoring a particular image. Applied to artists, it has the effect of banning from their visual vocabulary a symbol "often chosen as much for [its] emotive as [its] cognitive force" (*id.*). Not only does Section 42.09 not promote nationhood and unity, it imposes an impermissible burden upon the protected expression of artists. Thus, it does not survive the strict scrutiny required by the First Amendment.

CONCLUSION

The judgment of the Texas Court of Criminal Appeals should be affirmed.

Respectfully submitted.

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January 25, 1989

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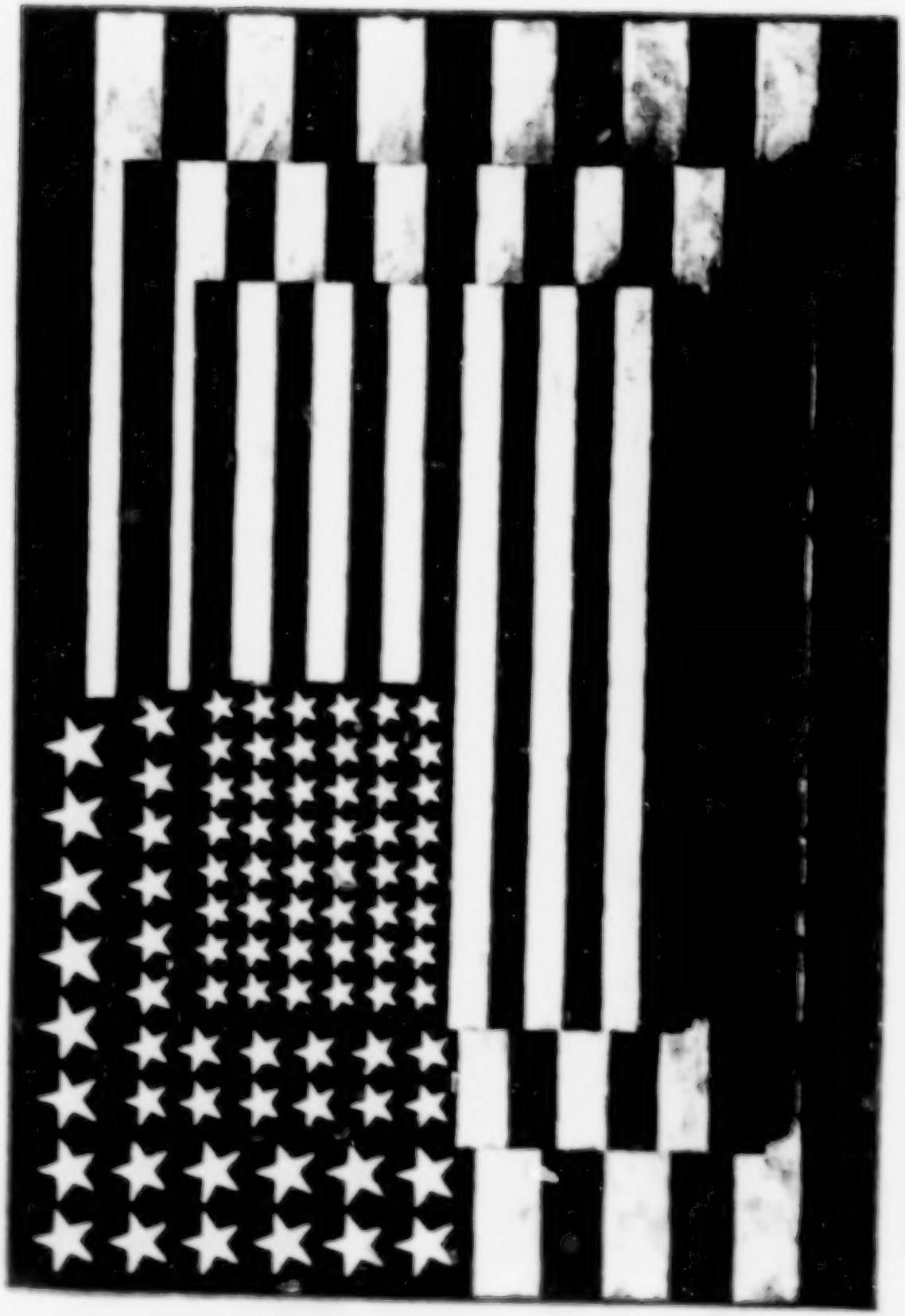
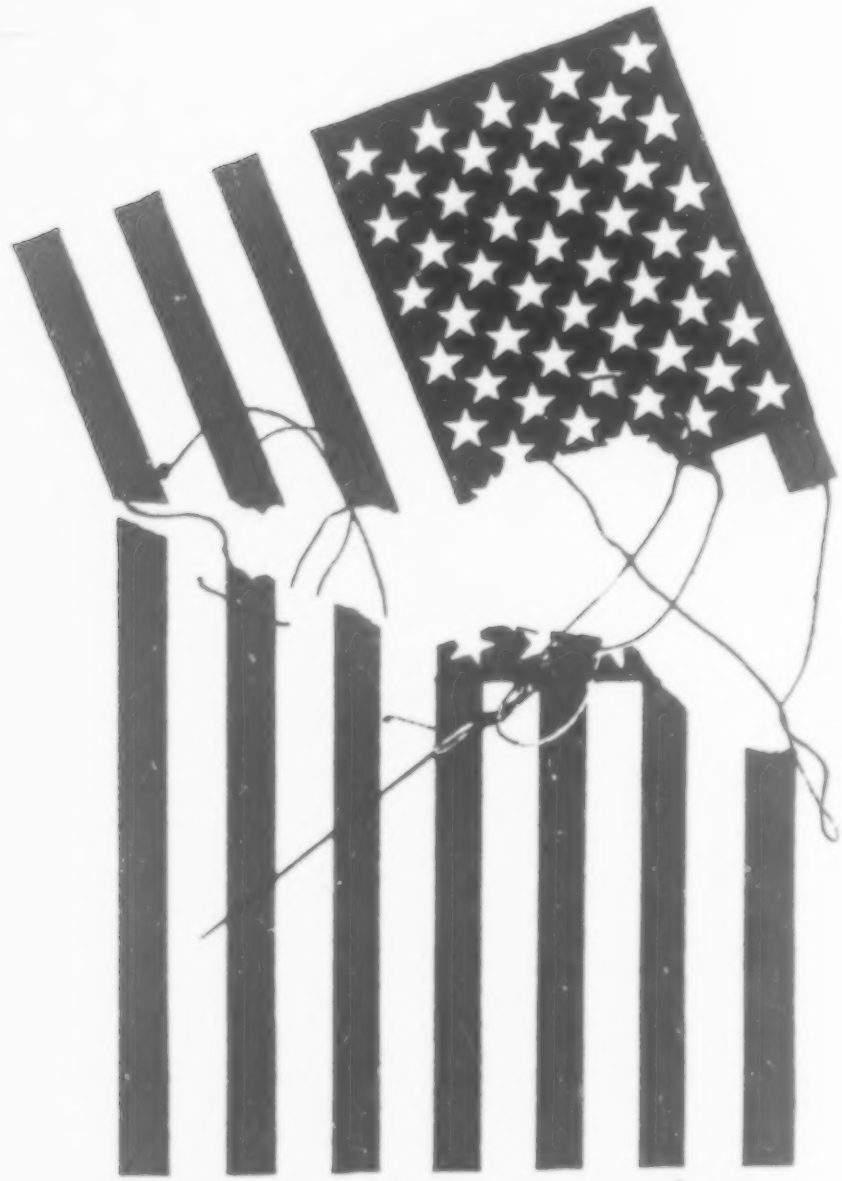


I pledge allegiance to the flag of the United States of America and
to the republic for which it stands, indivisible, with liberty and justice for all.

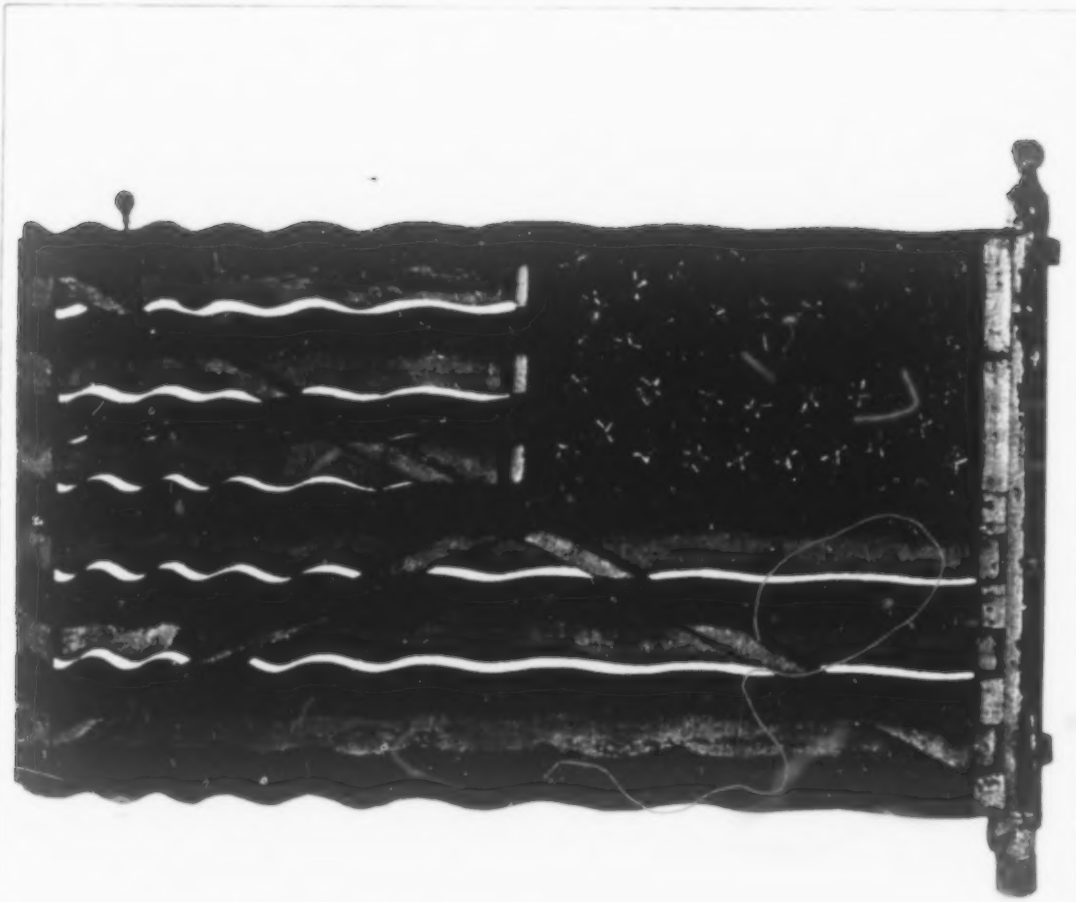
5a

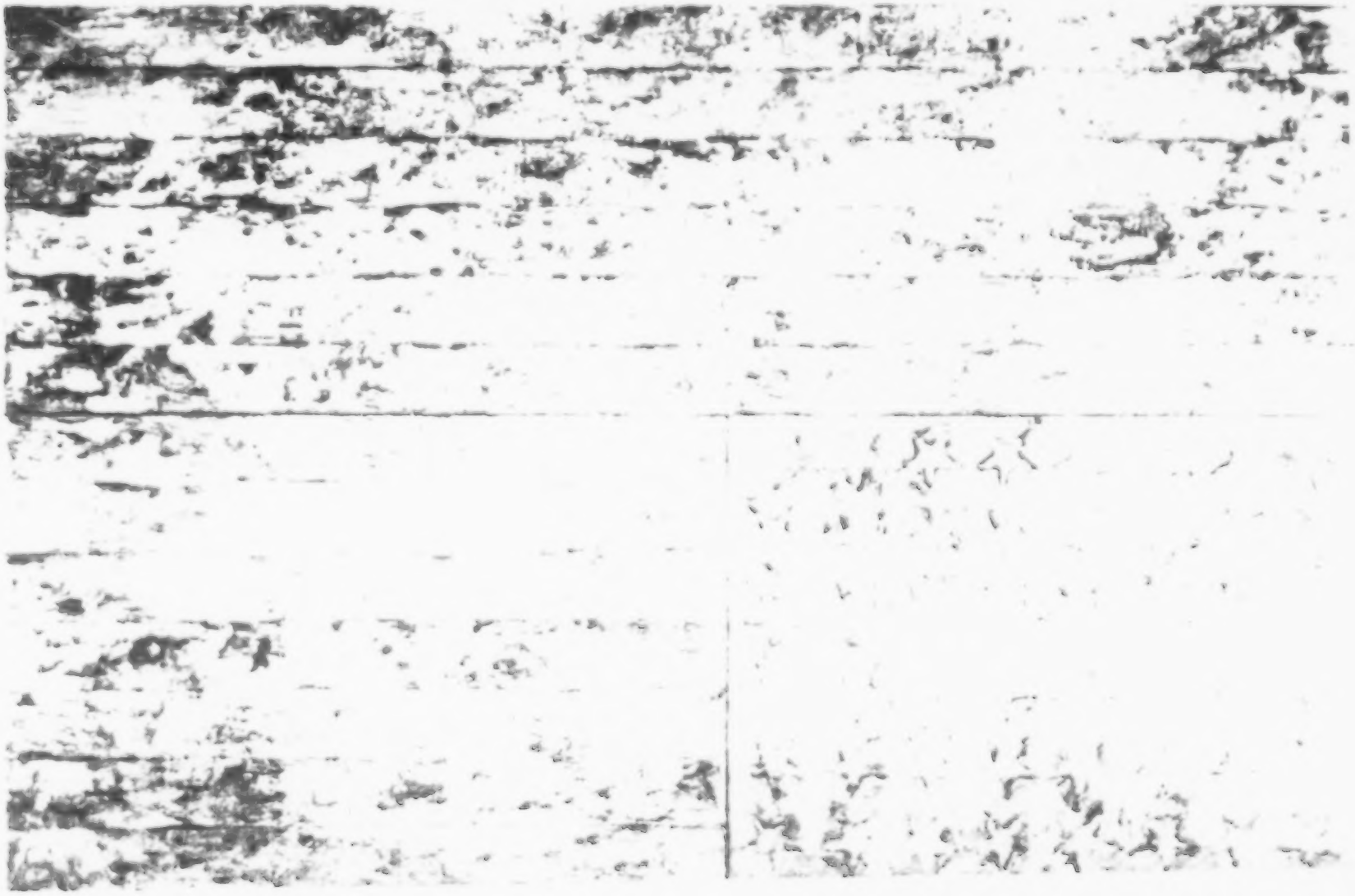
GIVE A DAMN



MEND AMERICA

"STEP RIGHT UP—EVERYBODY GETS ONE STAR AND PART OF A STRIPE"





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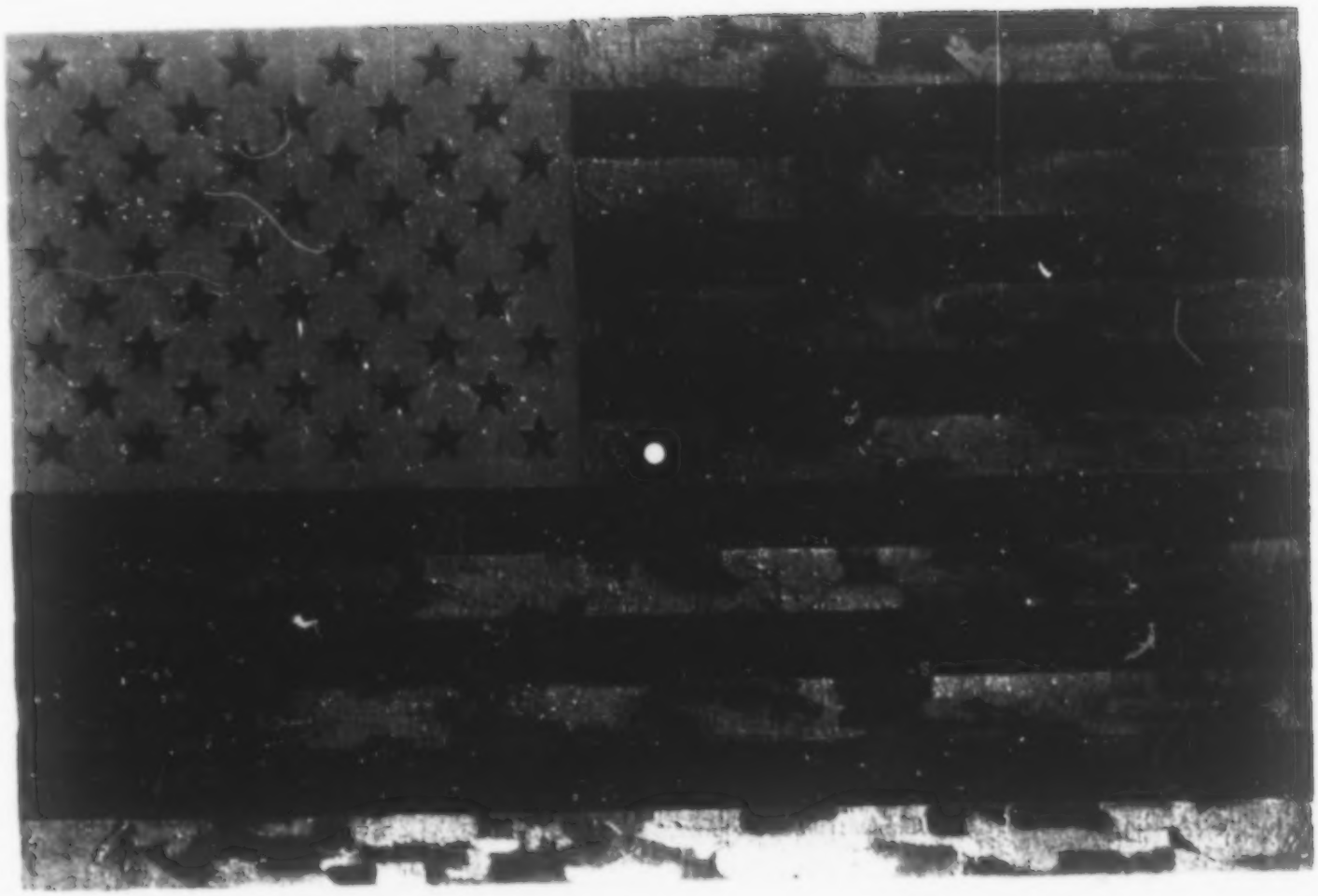
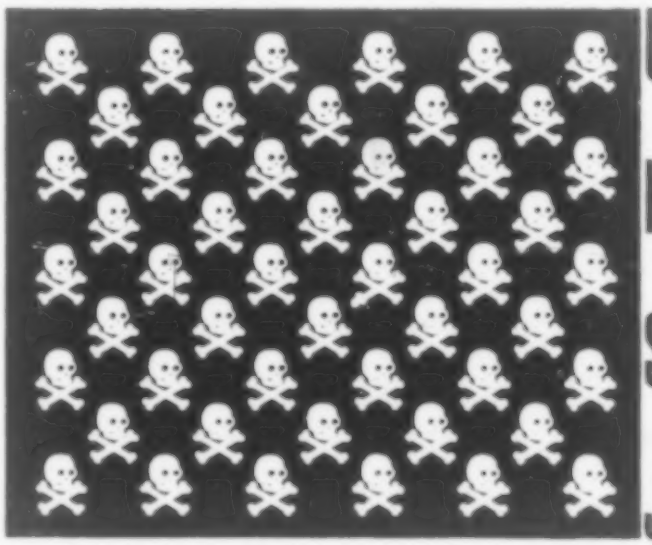


MORATORIUM



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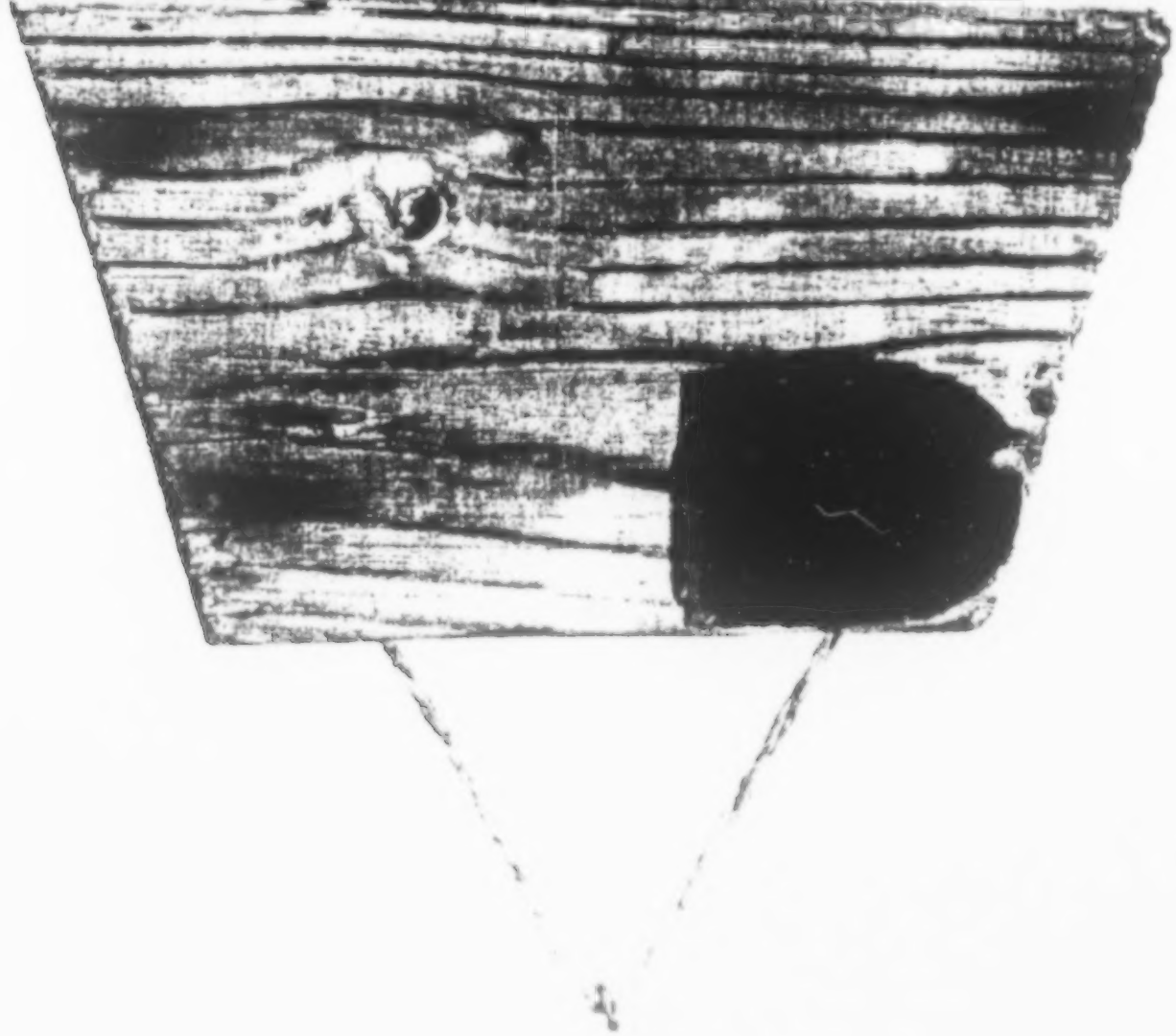

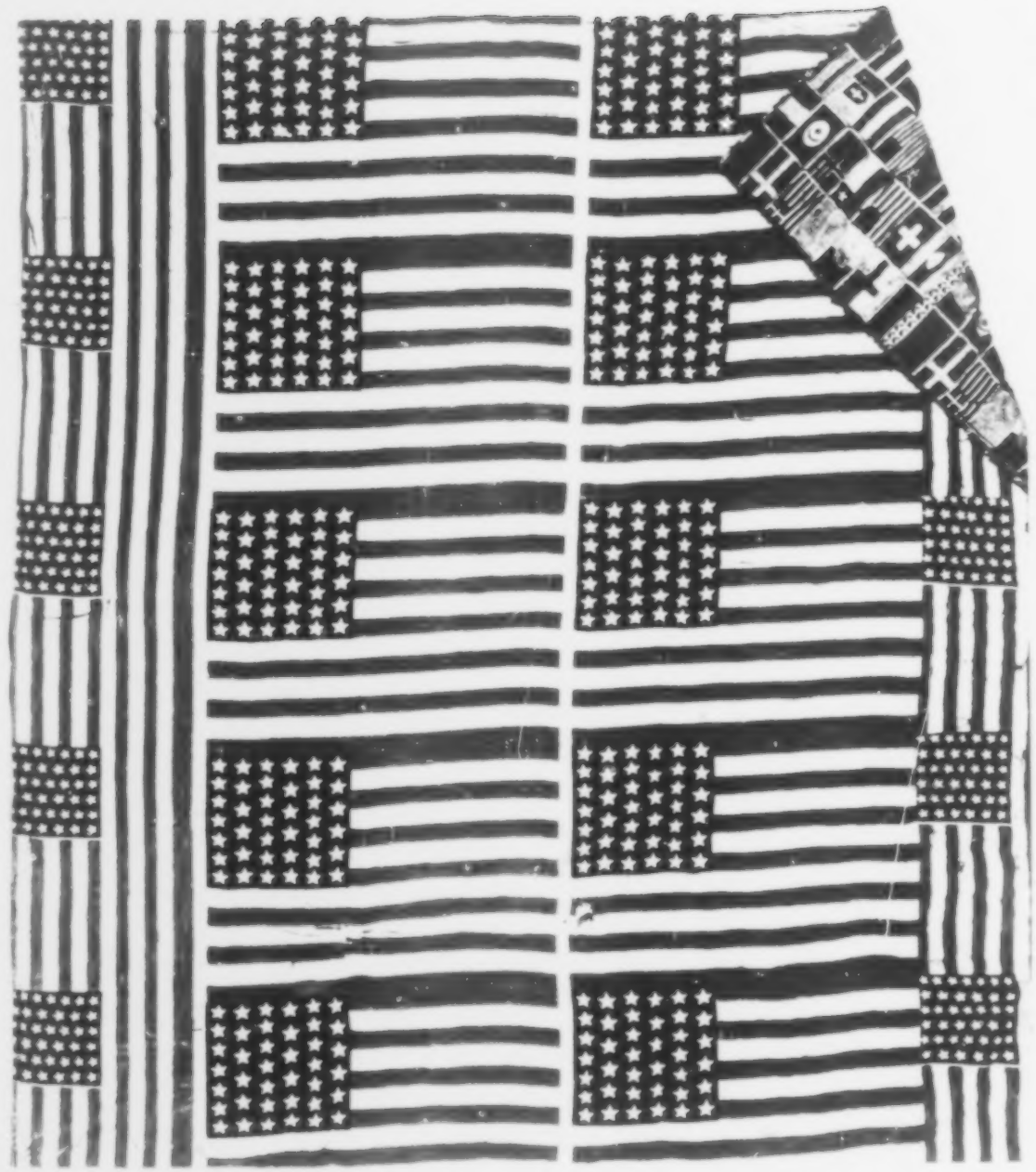

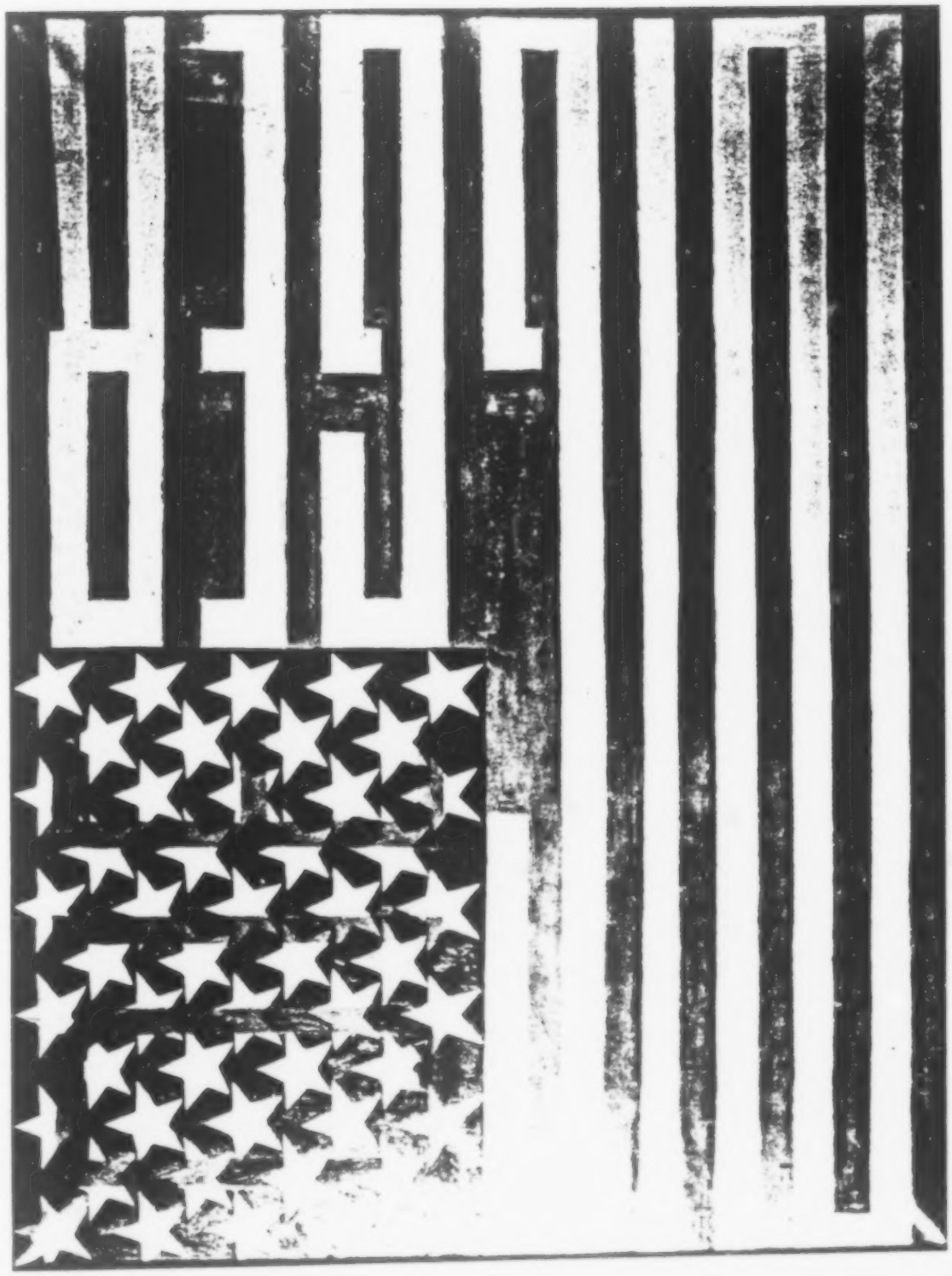

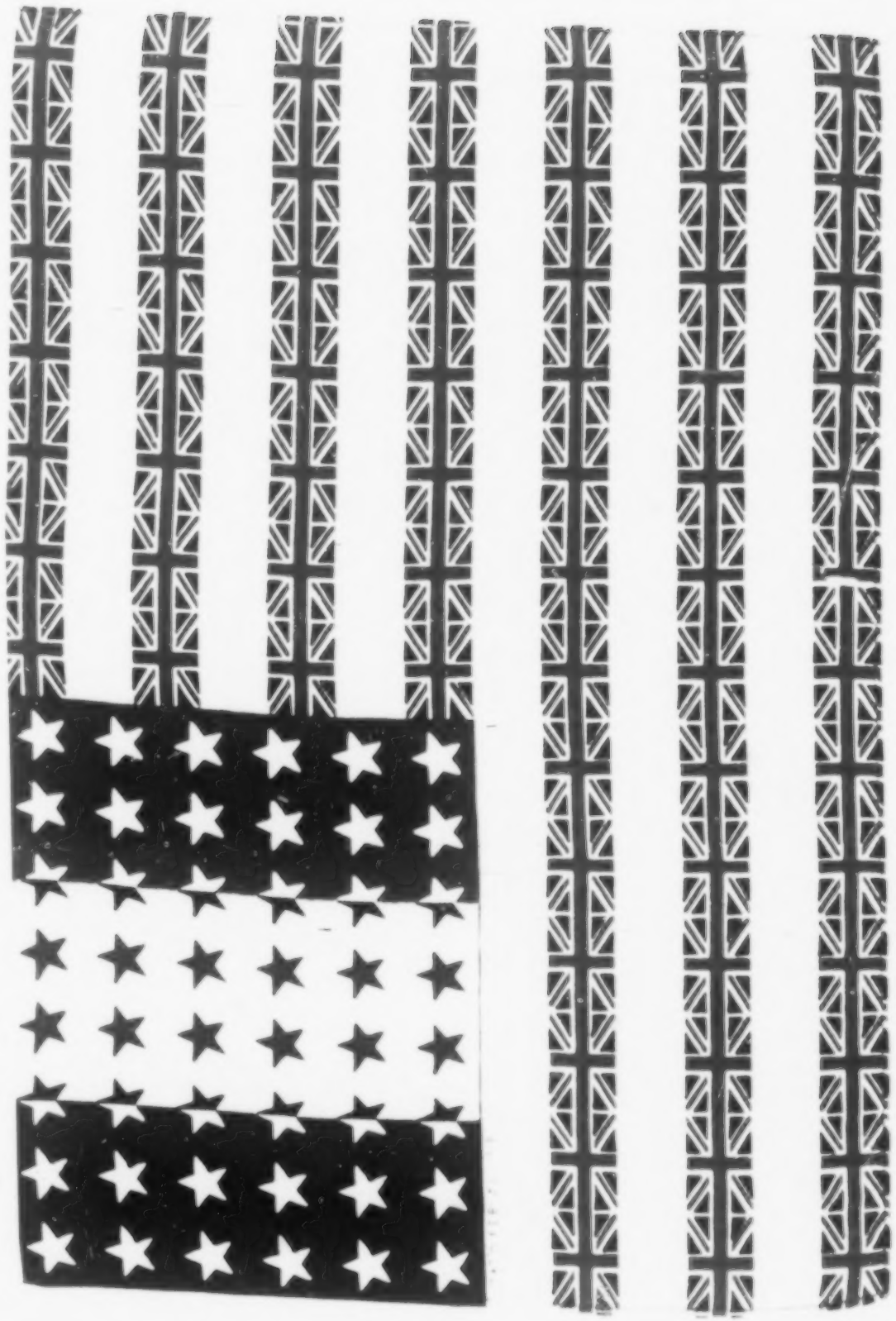

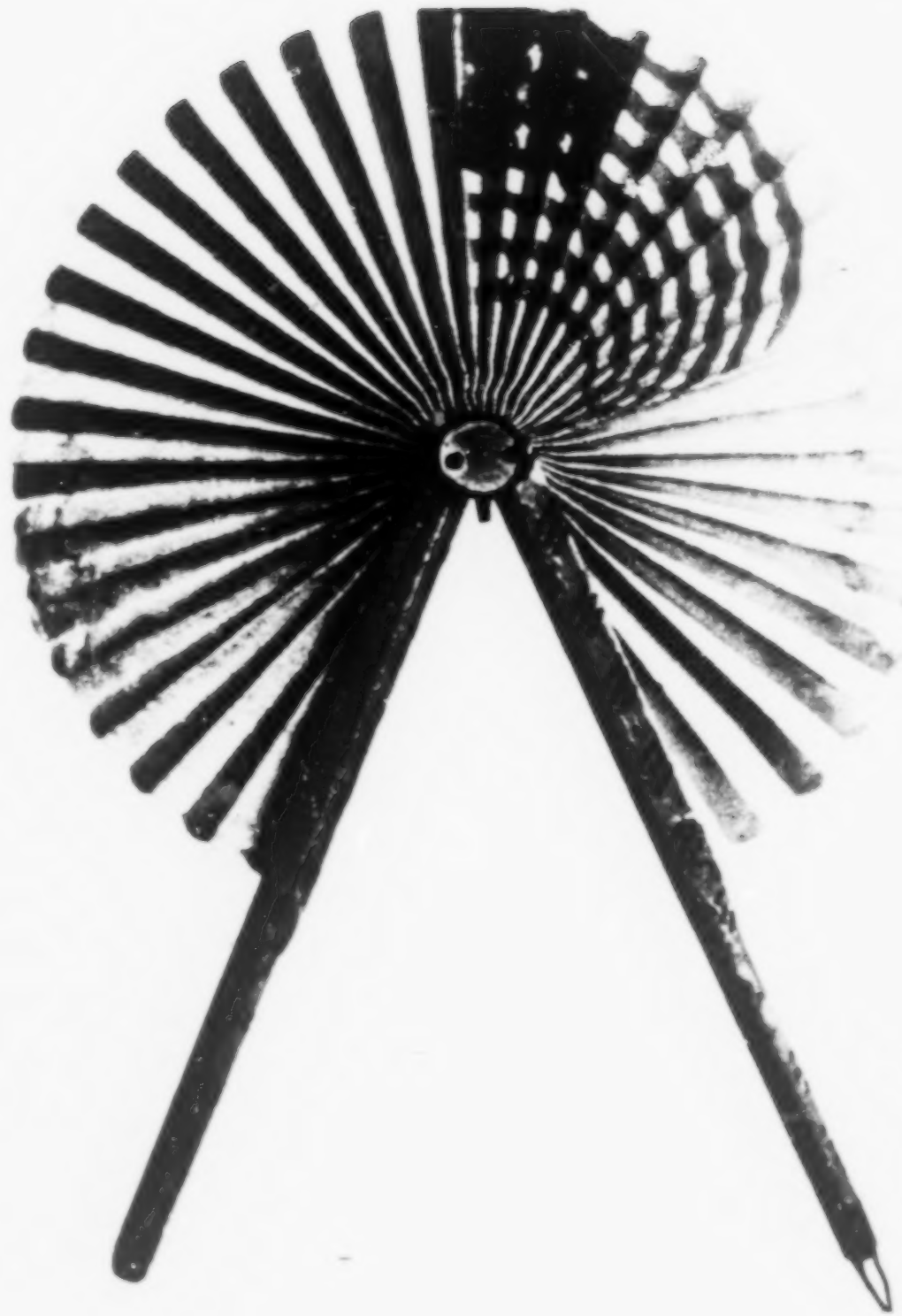

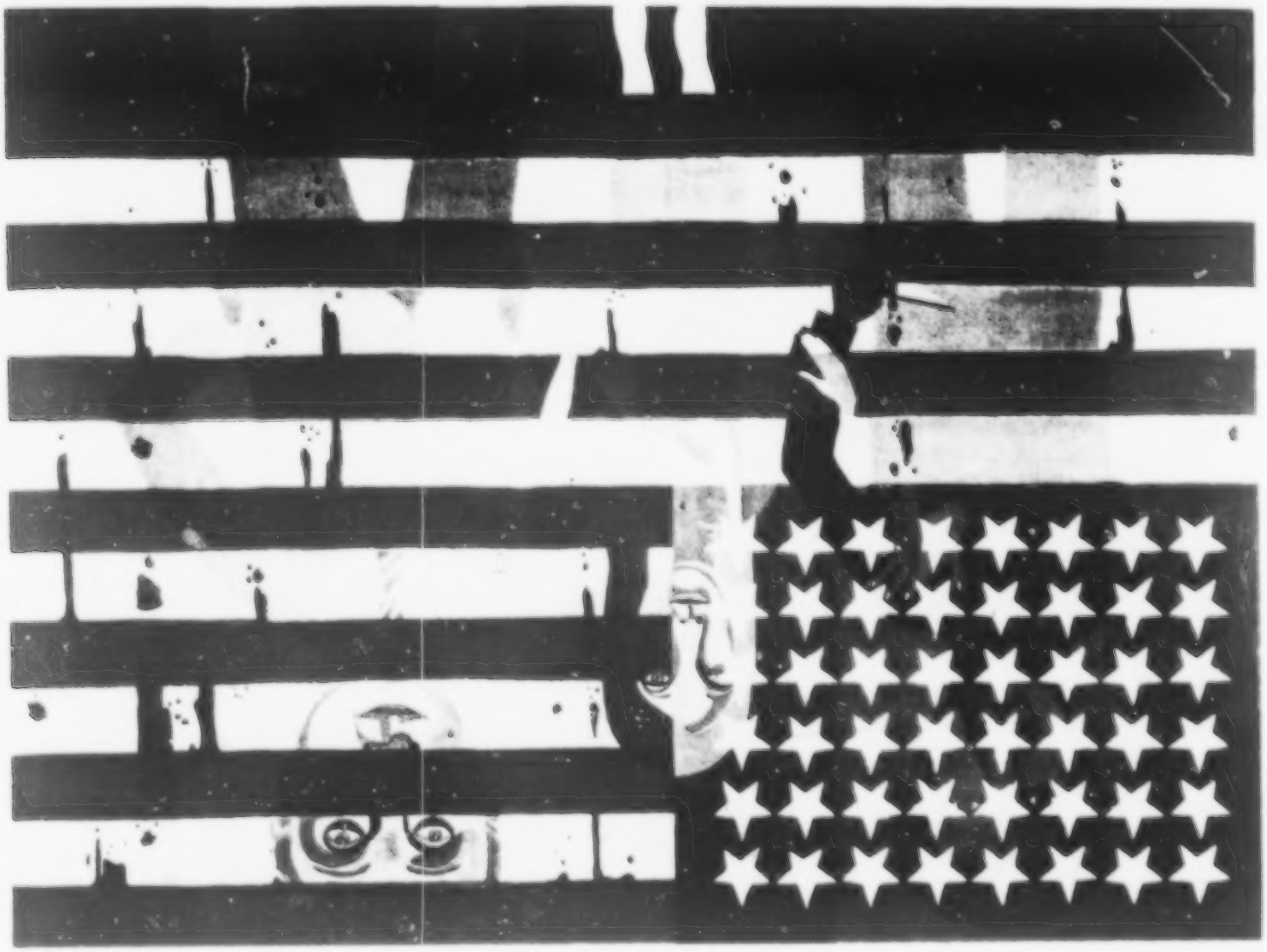

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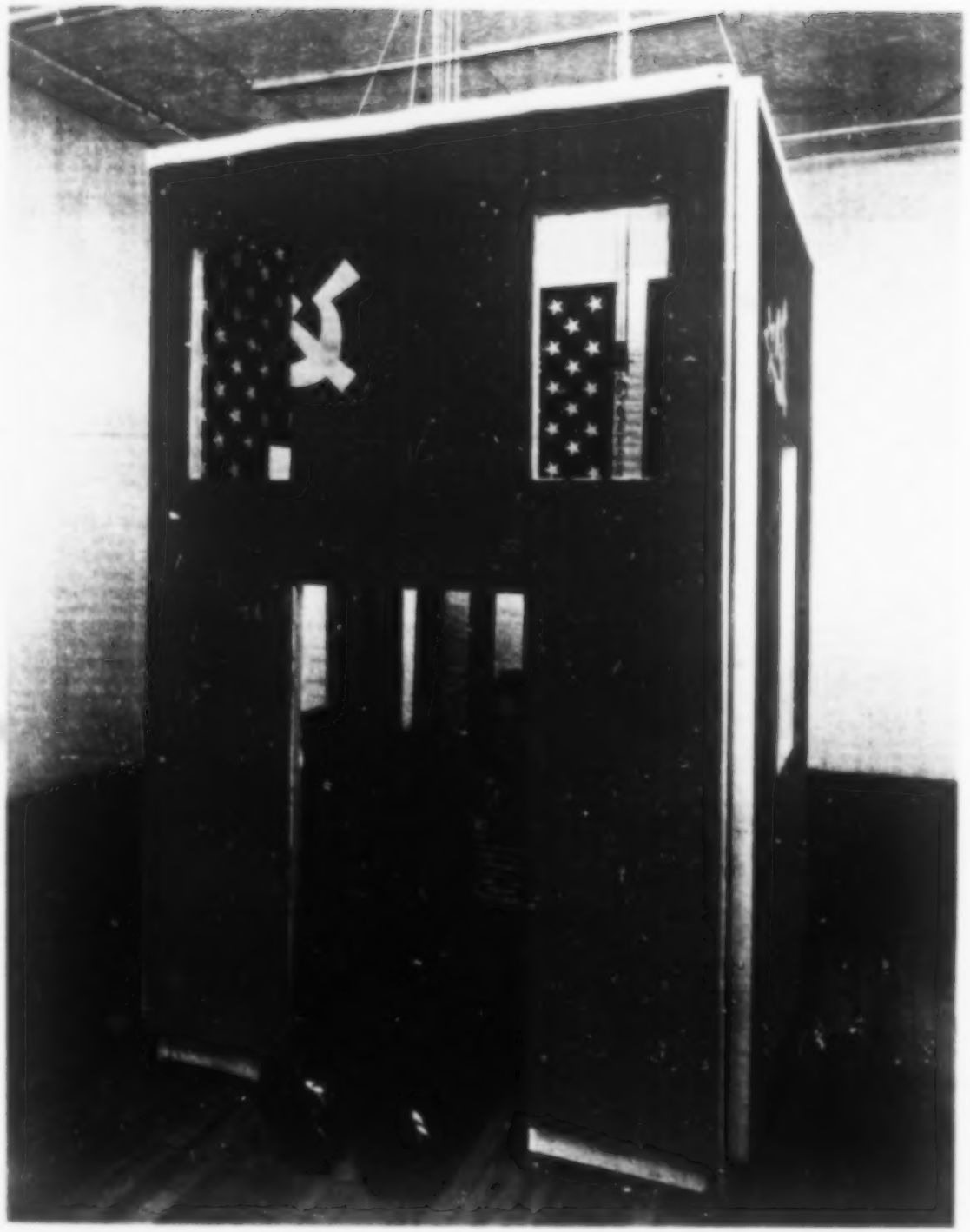

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